Social Security as a Public Interest

Vonk, G.J.; Tollenaar, A.

SOCIAL SECURITY AS A PUBLIC INTEREST

Social Europe Series, Volume 24

SOCIAL SECURITY AS A PUBLIC INTEREST

A multidisciplinary inquiry into the foundations of the regulatory welfare state

Edited by

Gijsbert Vonk
Albertjan Tollenaar

In co-operation with:

Alex Corrà
Mirjam Plantinga
Ko de Ridder
Bram Rijpkema

intersentia
Antwerp – Oxford – Portland

Distribution for the UK:
Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel.: +44 1865 51 75 30
Email: mail@hartpub.co.uk

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Tel.: +1 503 287 3093
Email: info@isbs.com

Distribution for Austria:
Neuer Wissenschaftlicher Verlag
Argentinierstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:
Intersentia Publishers
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

Social Security as a Public Interest
Gijsbert Vonk and Albertjan Tollenaar

ISBN 978-94-000-0110-7
D/2010/7849/18
NUR 825

ACKNOWLEDGEMENTS

This book is the result of the research programme 'public governance and the welfare state'. The members of the research group are Gijsbert Vonk (programme leader), Ko de Ridder (supervision), Mirjam Plantinga, Albertjan Tollenaar (both post doctoral researchers), Bram Rijpkema and Alex Corrà (both PhD fellows). They are all affiliated with the University of Groningen. The researchers wish to acknowledge their gratitude to the Stichting Instituut Gak (SIG) that funded this research programme.
Earlier versions of the chapters included in the book have been discussed at an international conference organized by the newly founded Groningen Centre for Law and Governance (GCL). The GCL (www.rug.nl/gcl) conducts legal research into the balance between public and private interests.

Groningen, July 2010

TABLE OF CONTENTS

ABBREVIATIONS

BGB	Bürgerliches Gesetzbuch (German Civil Code)
BW	Burgerlijk Wetboek (Dutch Civil Code)
CBS	Centraal Bureau voor de Statistiek (Statistics Netherlands)
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union
CPB	Centraal Plan Bureau (Netherlands Bureau for Economic Policy Analysis)
EC	European Commission
ECJ	European Court of Justice
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
ESC	European Social Charter
EU	European Union
ICESR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
SGB	Sozialgesetzbuch (German Social Security Act)
VAT	Value Added Tax
UN	United Nations
UWV	Uitvoeringsinstituut WerknemersVerzekeringen (Netherlands Employee Insurance Agency)

RESEARCH PLAN AND OUTLINE OF THE BOOK

Gijsbert Vonk and Albertjan Tollenaar

1. BACKGROUND AND PURPOSE OF THIS STUDY

This book is written as a contribution to the Groningen research programme 'public governance and the welfare state'. This six year programme, accommodating two PhD and two post-doctoral researchers, aims at gaining a deeper understanding of the role of the state in privatized social security programmes. This topic has attracted much attention ever since successive governments shifted the governance of social security from the public to the private domain. In the Netherlands for example, this has been done especially by strengthening the responsibility of the individual employers and allowing a larger role for private actors, such as insurance companies and private re-integration services. This shift of governance has mostly affected the areas of health care, sickness and invalidity insurance and re-integration services.

Looking closer at the various measures that were introduced in different countries, it appears that privatisation is never fully fletched. Governments maintain a firm grip on privatized agencies, using various instruments such as legislation, supervision, contract management, programme evaluation, etc. This form of public control over private social security schemes is sometimes referred to as the 'regulatory welfare state'. The central question of our research programme is to what extent the regulatory framework (in the wide sense of the word) contributes towards social security as a public interest.

While the project deals with the functioning of various regulatory instruments in social security, it also touches upon the underlying question of defining the public interest of social security itself. Why should the government want to maintain a grip on privatized social security schemes in the first place and what elements of these schemes should be made subject to government control?

The latter question is a difficult one to tackle. Not only is the subject likely to touch upon political and ideological preferences of the individual, but more

importantly from a point of view of academic discourse, it is perceived very differently by the various disciplines. Economists tend to approach it from the angle of market failure theory. In jargon: when transactions lead to negative external effects (such as free rider behaviour, cherry picking, adverse selection, etc.) the state must step in to regulate the problem. Social scientists are equally interested in the role of the state in the provision of welfare, but their understanding of this subject and the questions they raise may be very different (also amongst themselves, depending on specific background or interest: political science, sociology, anthropology, etc). Historians will point out that the present day public programmes have private roots and that the contemporary leaning towards some privatization is only a relative change when seen from the perspective of the long and rich history of the welfare states. Lawyers (by the very nature of their subject) and also some philosophers (in their quest for understanding the meaning of justice) employ a normative approach when defining the role of the state in social security.

The confusion is exacerbated by the fact that each of the disciplines makes use of its own conceptual framework. Similar terms may have different meanings. The Babylonian misunderstandings which surround our subject, led us to the conviction that it is dangerous to mix the various approaches. Better to respect the peculiarities and methods pertaining to each of the academic disciplines. Perhaps at later stages, it is possible to come to some overarching analysis as to why various disciplines come to different (or preferably similar!) outcomes, but first we should gain a deeper understanding of the way the disciplines approach the subject of social security as a public interest. The purpose of this study was to obtain such understanding.

2. CENTRAL RESEARCH QUESTIONS AND COMPOSITION OF THIS BOOK

The study was set up almost by means of a scientific experiment. Four disciplines have been selected to offer contributions: economy, public administration (being in itself an amalgam of various social sciences), law and philosophy. The reason for this selection is that in our previous discussion the first three disciplines seemed to have strong views on the methods of identifying public interests. Philosophy was added at a later stage in order to obtain a better insight in the background of different approaches to the public interest.

Part A of the book is entitled 'Social security as a public interest'. We confronted four authors, each from a different discipline, with a uniform instruction, based upon one simple question (although, admittedly, containing two elements):

is social security considered to be a public interest and how does the answer to this question reflect on the role of the state in social security?

Part B is entitled 'The instrumentalisation of the public interest'. A second group of writers was recruited to reflect upon the question: *how does your discipline perceive the instrumentalisation of the public interest in social security?*

While it was very tempting to give further working definitions (for example of the term 'public interest') we refrained from doing so, as we were primarily interested in learning from the disciplinary framework of the authors themselves. It was assumed that their own approaches would reflect pre-occupations which are typical for the disciplines involved. In this way the experiment would yield the clearest results.

3. SOME PRELIMINARY OBSERVATIONS

3.1. SOCIAL SECURITY AS A PUBLIC INTEREST: A TAUTOLOGY?

Social security is a collective affair. It cannot be achieved by someone on his/her own. If an individual decides to save up money for him/herself, that is very nice for this individual but it is not social security. Social security always presupposes an element of sharing and solidarity. This being the case, one can wonder whether raising the question of the public interest is not a superfluous exercise. Is it not so per definition?

We are aware of this dilemma. It is for this reason that the book is entitled 'social security *as* a public interest'. Yet it must be borne in mind that the very fact that social security is a collective affair, does not mean that we agree upon the interests that it serves and why these interest should be considered as 'public'. Indeed, the various contributions to our study provide us with an impressive testimony of the differences of opinions that exist in this regard. Furthermore, one must take into account that disciplines provide different explanations as to why social security as a collective instrument is necessary. So even when the raising of the question of social security as a public interest is an expression of tautology, it is still an interesting one.

The tautology problem lingers on when we have to define the concept of social security used in this book. Very often reference is made to the definition employed in major international instruments, such as ILO Convention No. 102 and Regulation (EC) No. 883/2004. This definition refers to a system of income

protection related to number specific social risks, such as unemployment, sickness, invalidity, old age, etc. While it is also possible for us to fall back upon this definition, there is one element that requires extra attention. The concept of social security is often identified with public governance in the formal sense of the word. Thus, for example, ILO Convention No. 102 and Regulation (EC) No. 883/2004 exclude contractual social security arrangements from their material scope of application.[1] If we take a similar stance, raising the question of the public interest in social security is not possible as there would simply be no social security outside the public domain.

There are two major problems with this public law bias of the concept of social security *stricto sensu*. In the first place, it excludes non-governmental schemes, private and occupational, that contribute equally to the realization of the objectives of social security. In the second place, it does not take into account the diversity of the role of the state vis-à-vis social security at large. In reality the social security systems of most countries reflect a mix of public, collective, or private approaches. These approaches may exist side by side, or layer upon layer, or may even be mixed within single schemes; sometimes public schemes allow for private elements (e.g. opt outs, private administration), while private schemes are often publicly regulated and supervised. The role of the state in relation to social security varies from direct provider or regulator to mere facilitator and there exists an array of instruments in support of these roles: legislation, administration, supervision, contract management, fiscal steering mechanisms, benchmarking, public exposure, etc. The foregoing also infers that privatization of social security is not necessarily as extreme as the term suggests; it may merely involve a shift in governance (more private and less public) or even less than that: just a different form of public governance. Indeed it is the awareness of the alternative forms of government intervention that can be used that gives rise to the concept of a 'regulatory welfare state', a concept that is increasingly used to denote mixed private public approaches in social security.

So, for the purposes of this study it was not possible to restrict ourselves to public social security schemes in the formal legal sense of the word. All systems providing protection against the internationally recognized social risks must be taken into account, regardless of whether these are based upon formal state legislation, collective agreements or any other form of self-regulation or even individual contracts. Thereby, we remain conscious of the fact that also schemes which are formally covered by private law may in fact come under some form of

[1] Unless included by separate decision (art. 1, sub l Regulation (EC) 883/2004) or supervised by public authorities and jointly administered by employers and workers (art. 6 ILO Convention No. 102).

public governance. In that sense it is not so much the state responsibility which is challenged in this book, but much rather the public-private dichotomy.

3.2. CHOSEN ABSTRACTION

The general nature of this study also infers that social security is treated as a monolith. In reality social security is not. There are different systems for many different risks. How to regulate the public interest probably depends very much on the system involved. For example, a private health care system gives rise to different threats to the public interest than in the case of insurance against occupational injuries (the latter risk being primarily an employer's liability). Likewise, it makes quite a difference whether we speak of basic minimum subsistence schemes or of more generous benefit schemes (the former will invariably weigh heavier on the responsibility of the state than the latter). This book merely contains a preliminary theoretical reconnaissance. Further differentiation as to the risks or systems involved was not possible.

3.3. SOCIAL SECURITY VERSUS SOCIAL WELFARE

This study sometimes refers to the concept social welfare rather than social security. The first term is wider, in the sense that it refers not only to the provision of income security in case of poverty or certain risks, such as unemployment and old age, but to the whole spectrum of government action intended to make sure that citizens meet their basic needs, such as education, housing and health. Also 'welfare' does not only refer to cash benefits schemes, but also to various types of services and in-kind programmes which are sometimes considered to fall outside the social security domain, such as probation and parole, child protection services, socialization services, etc.[2] The core object of this study is social security. Nonetheless, the wider term social welfare is also used. This can be explained by the fact that very often certain propositions are not only applicable to social security, but to the welfare state as a whole.

3.4. NATURE AND AMBIT OF THE STUDY

While the book has been written by mainly Dutch authors (in fact with two exceptions all authors are or were employed at the University of Groningen), it is not a book about the Netherlands' social security system. We asked the authors to take into account international literature and to take their examples not only

[2] For the meaning of the term social welfare, see Popple & Leighninger 1993.

from the Netherlands but also from other countries. Nonetheless, due to the background of most of the authors a certain Dutch bias could not be avoided.

The general nature of this study infers that we refrained from analysing the situation from the perspective of one country or a particular legal, political or economic system. Thus, for example, no specific attention has been paid to the framework of the European Union. This does not mean to say, of course, that some writers do not incidentally refer to some countries or to the EU by means of a single reference.

4. SHORT ANALYSIS OF THE CONTRIBUTIONS

On the basis of these preliminary remarks the contributions to our study can be compared. In this paragraph we aim to briefly analyse the individual chapters, providing an opportunity to make comparisons. The conclusions will be drawn in the next paragraph.

4.1. PART A: SOCIAL SECURITY AS A PUBLIC INTEREST

Economy

Two colleagues, Andries Nentjes and Edwin Woerdman, both professors of law and economics at the University of Groningen were responsible for the economic analysis. The authors are as much interested in identifying and correcting market failures in the private provision of social security as in public sector failures. Their contribution immediately throws us off balance. Our starting point was that privatization raises the question of safeguarding the public interest. However, the writers assume the reverse: privatization measures have been introduced in the pursuit of the public interest.

According to the authors, economics defines the public interest as maximizing the benefits of economic transactions for the society. This definition is (still) in line with the old utilitarian maxim according to which societies should aim at the greatest happiness for the largest majority, but it can also be formulated in more modern terms, such as transitions between work and care or transitions on the labour market (changing jobs). The next observation is that the 'mixed economy' is based upon the tacit assumption that the free market serves the public interest the best, as this leads to an optimal allocation of resources. Therefore, there is only a need for the government to step in when markets fail

because of the occurrence of negative external effects, such as cherry picking, creaming, free rider behaviour, etc.

The rise of the public social security system can to a large degree be explained with reference to market failure theory. The major market failure is situated in the private organisation of solidarity amongst citizens. If vertical solidarity was to be left to charitable institutions, the system would be underfunded. Free rider behaviour would induce many to remain idle while only some contribute. The case is somewhat different for horizontal solidarity. Here the authors assume that the masses were too poor to pay private insurance contributions. But they allege that there were also paternalistic motives involved in introducing mandatory social insurance, or at least that the argument that mandatory social insurance only serves to correct failures in the insurance market is economically unconvincing.

The authors also set out the drawbacks of the public system. Economic science is not only interested in market failure, but also in public sector failure. This comes under the umbrella of other terms, such as overproduction, overconsumption, X-inefficiency and lack of choice. In social security these advantages accumulated in benefit dependency, a spectre which continues to haunt public social security systems to date.

When the sum of advantages of a public system is outweighed by the disadvantages a partial privatization is required, as this will give room to behavioural incentives which increase efficiency and stimulate individual responsibility. In all, not only the rise of the public social security system but also the (re)introduction of private elements follows the economic rationale of the public interest

Public administration

One of the post-doctoral fellows in the programme, Mirjam Plantinga, analysed the public interest from the perspective of public administration. She refers to the definition of the public interest used by Bozeman (2007, p. 12) as outcomes best serving the long-run survival and well-being of a social collective construed as a 'public'. This definition would coincide with the way sociologists tend to perceive social security, i.e. as something which is instrumental to the well-being of the society as a whole, either formulated negatively (e.g. avoiding social disorder)[3] or positively (e.g. in terms of social cohesion).[4] Nonetheless, Plantinga observes that in social sciences a unifying definition of the public interest does

3 Cf. De Swaan 1989.

4 Cf. Berghman & Verhalla 2002, p. 11–20.

not exist. She is therefore more interested in contemporary methods of identifying public values.

The public value approach was first articulated by Moore (1995). According to Moore, the idea of managerial work in the public sector is to create public values just as the aim of managerial work in the private sector is to create private values (profits). Public values cannot be derived from the aggregation of individual preferences but are expressed by citizens when they make collective choices. Thus, the underlying values of our system can be traced by studying various sources such as constitutional texts, court cases, political debates, journal articles etc.

In the public value approach, the concept of 'public value failure' plays an important role. If a system no longer upholds underlying values, then that system can be said to have failed. This concept of public value failure is deemed to be different from the economic concept of market value failure.

Is social security a public value? Clearly so. Again and again research provides evidence for broad underlying support for the welfare, particularly vis-à-vis the elderly, the handicapped and children. However, when dealing with support systems for the poor and the unemployed Plantinga points out an interesting anomaly. In countries with weak social security systems, public support for these systems is low. In more developed systems, this is less so. Citizens either see themselves as net beneficiaries of the system, or support washes away.

Plantinga's analysis of public support for welfare states uncovers some general notions as to what should be considered as the core of the welfare state for which governments should take responsibility. A public interest to protect vulnerable groups can clearly be identified. Which groups are believed to deserve protection and which level of protection is believed to be necessary does, however, depend on the institutional context. As a result, the question of allocating responsibilities for social security between the public and the private sector is also relevant; it may differ from country to country and over time.

Law

The legal analysis of the public interest was provided by George Katrougalos, Professor of Public Law at Demokritos University of Thrace, and by Gijsbert Vonk. They pointed out that although the concept of the public interest does play a role in law, it is an open norm whose meaning is variable. They therefore set aside any legal public interest doctrine and instead rely upon the relevance of socio-economic fundamental rights, adopted in national constitutions and international human rights instruments. Social security is recognised as one of these rights.

The recognition of social security as a fundamental right did not appear out of the blue. It is reflected in the various ways European states gradually attempted to solve the 'social question' in the 19th century. The constitutional recognition of social rights implied a change in the functions of the state: instead of regulating the market only on the basis of norms that were derived from the private law of contract, property and tort, states actively intervened in the operation of the economic system in order to achieve results that the economic system would not achieve on its own. In nearly all countries in Europe – the exception being the United Kingdom[5] – this change was given explicit constitutional recognition, either by explicit 'Social State' clauses or by analytical enumeration of social rights, or by both.

While there is much difference in opinion as to the legal nature of socio-economic rights, the recognition of social security as a fundamental right brings the subject of social security into the public domain. Social security is a public concern and when it fails to deliver, it is the state that must be held accountable.

Which obligations arise for the state from the existence of a right to social security? In answer to this question, Katrougalos and Vonk refer to the logical structure set out in the recent General Comment No. 19 of the UN Commission of Economic, Social and Cultural Rights (CESCR). In short, the state may not negatively interfere in private social security (duty to respect) but must ensure the proper functioning of private social security, making sure, for example, that funds are not abused (duty to protect). Furthermore the state must actively develop a policy on the welfare state and create – as a minimum – a safety net in the form of a social assistance scheme (duty to fulfil). The conclusion is that under the doctrine of state responsibility, any division of power is feasible as long as it realises the objectives of social security. At the same time it must be realised that a heavier responsibility lies on the shoulders of the state when it comes to providing minimum protection. The state must provide at least a minimum subsistence level. Furthermore, a system of basic social insurance will not suffice without a strong element of state interference, as the necessary solidarity amongst the insured population will not arise spontaneously. When dealing with additional benefits, the state can more easily fall back upon a regulatory or facilitating role.

Katrougalos and Vonk accept that the above categorisation of state obligations is merely a framework within the formal sense of the word. It does not make clear what social security is, or which substantial rights must be respected, protected or fulfilled. They put forward seven basic principles in order to find out the extent to which rights to social security are actually supported by concrete legal standards, adopted amongst others in conventions of the ILO and the Council of

5 This is because the UK does not have a written constitution.

Europe. The principles come under the headings of protection, universality, inclusion, reliability, solidarity, equality and good governance. It appears most of these principles are supported by concrete legal norms, albeit some more than others, and in differing degrees of concreteness.

Philosophy

The philosophical dimension was added to obtain an overarching understanding of the public interest in social security. For Onno Brinkman, Senior Policy Advisor International Affairs in the Ministry of Social Affairs and Employment, it was not an easy task to bring the wealth of philosophical thought to bear on the question of why we perceive social security as a public interest. The question is never posed in these terms and there are few fixed points of reference as philosophers – by their nature – tend to disagree about almost everything. The controversy starts with the very question of how the concept of the public interest should be conceived. Is it merely an aggregation of individual needs or is it more than that, as Rousseau argued when he introduced the concept of the general will (*volonté générale)?*

Brinkman avoids such questions by expressing his personal point of view. He takes the post-war consensus around Keynesian economic theory as a starting point for his analysis. According to him, this consensus led to a watering down of the differences between the public and the private interest. What was good for the public interest was equally good for the private interest, and *vice versa*. But when the validity of Keynes' economic theory had run its course, it became necessary to reformulate the relationship between the public and the private interest. Brinkman described the major movements in political philosophy that have endeavoured to respond to this situation.

The distinction between liberalism and communitarianism is a theme running through his account. Liberals are united in their opinion regarding the autonomy of the individual and the neutrality of the state. Egalitarian liberalism formulates the public interest as a 'joint venture' for the benefit of individual participants. It puts a strong emphasis on reciprocity because the cooperation of all is needed to make the joint venture a success. Through this, the concept of distributive justice, including social security, acquires instrumental characteristics: it is considered by these liberals as a means for ensuring the cooperation of all. Although libertarians acknowledge a common fate, this goes no further than providing mutual protection in the face of external threats. The public interest is principally revealed in the protection of the inalienable rights of the individual, in particular the right of ownership. They believe that private interests can best be realised through the operation of the market or through the exercise of charity.

Communitarians oppose both these notions. From their perspective, the individual can only be understood as part of the community in which he lives: as a result the individual is not autonomous and neither is the state neutral. By its nature communitarianism is committed to the principle of reciprocity. After all, the very core of communitarianism is that the individual can only develop in interaction with the community.

This contrast between liberals and communitarians is perhaps the most revealing element in Brinkman's contribution. Either the final objective of social security is the liberation of the individual who must be able to fully develop his natural capacities, or it is the quality of society as a whole. Fortunately it is not necessary to make a principle choice between these two extremes. They balance each other out. Only when one extreme is given too much priority over the other do we enter a danger zone. For example, a system that only focuses on individual rights runs the risk that it benefits consumerism, while a system that is immersed in community obligations (workfare!) runs the risk of crushing the individual.

4.2. PART B: THE INSTRUMENTALISATION OF THE PUBLIC INTEREST: TOWARDS THE REGULATORY WELFARE STATE

Economy

For the analysis of their second contribution dealing with the instrumentalisation of the public interest, it is helpful to recall the mindset of the authors Andries Nentjes and Edwin Woerdman. They consider the introduction of private elements into the system as medicine to fight of the symptoms of a public welfare disease, consisting of overconsumption, overproduction and X-inefficiency. From a study of various 'rationalisation measures' introduced by the Dutch government over de last three decades, they conclude the evidence they collected does not support the hypothesis that the government has let down the public interest in social security. In their view the government focused on what it had to do: safeguarding the public interest in social security by trying to make it sustainable.

From an economic point of view rationalisation measures in the field of social security are instruments that serve the public interest. Such measures can come under various umbrellas. Governments can resort to 'negative measures' consisting of lowering benefits, restricting eligibility and, introducing more obligations for the claimant. Also positive changes can be considered, involving for example the introduction of voucher schemes which allow citizens to buy in services themselves. Many governments have introduced semi-markets, by making private actors (profit or non-profit) and/or other public authorities

compete for government contracts. In the Netherlands, for example, such markets have been created in the re-integration sector and for the care services for the handicapped and the elderly.

Nentjes and Woerdman analyse the problems of these semi-markets from an economic point of view. On the *supply side* services must be delivered. This means that often the market is not open to all potential suppliers; they have to meet certain standards before they can enter the market. For example it is undesirable for a supplier to go bankrupt, leaving the clients (citizens) without public services. Here the public responsibility for continuity of the public services calls for strict regulation of market parties. On the *demand side* the problem arises that the social services are often 'trust goods', making it difficult to formulate the exact conditions of these goods. Therefore the contracts relating to social services will often contain vague terms, which need further interpretation. The conclusion is that a perfect market for social services is far away and perhaps impossible to achieve. The Dutch semi-market of re-integration services serves as an example; in some cases the public 'principle', unable and not expected to conclude detailed contracts with the private agent,[6] was confronted with private parties that ran off with the money, not fully investing in the education or doing whatever was needed to re-integrate the client. A most popular evasive technique was to give the client a short term employment contract: long enough to *pretend* success and to cash the premium that could be shared with the employer.[7]

So while Nentjens and Woerdman are fully convinced of the need for social security reform, they are less sure about the economic success of various types of public sector innovations in social security involving a public/private mix. Most of all they call for further research.

Public administration

Ko the Ridder, professor of Public Administration at the Groningen University, was responsible for the contribution on the intrumentalisation of the public interest from the perspective of public administration. He makes clear that there are factors other than strictly economic ones which determine the success of privatisation measures.

First of all, the behaviour of individual officials must be taken into account. The classical assumption is that people working in a private environment focus mainly on increasing profit. This infers that privatisation of services will only

6 On the 'principle-agent theory' and the difficulties on contracting: Eisenhardt 1989, p. 57–74; Holmstrom 1979, p. 74–91.

7 Corrà, Plantinga & De Ridder 2009.

lead to better quality when the system is designed in such a way that the client satisfaction will increase profits. Civil servants working in the public sector are different. Traditionally their goal is to deliver justice, *sine ira et studio*; without prejudice, unequal treatment or other forms of arbitrary rule. Their oath of office leads them to the correct execution of the law. Discretion is applied on the basis of bureaucratic judgement, in two or three instances if so required. The mixture of public and private elements that is introduced in the wake of the regulatory welfare state, intermingles these two opposing value systems. For example, when it comes to influencing the values on the work floor the classical approach of staff training is no longer sacrosanct. More modern methods, based on a 'private' view of public organizations, use other methods inspired by the private sector. Under the umbrella of 'New Public Management' the traditional bureaucracy loses its traditional bureaucratic values, being steered on 'output' and 'costs'. The negative effects of this trend in terms of loss of professionalism and motivation are not always fully appreciated

Secondly, the social relations between institutions must be taken into account. New Public Management is a method employed *inside* the public organization. Privatization goes a step further. It may involve, *inter alia* the contracting out of services to private parties. The behaviour of contractual partners is not only determined by hard core economic aspects. A contract is more than an expression of mutual economic advantages; its success also depends on the level of trust that exists between contractual partners. In shaping the contractual relationships this element of trust may not be overlooked.

Thirdly, the system itself is a relevant factor. An interesting insight from the public administration point of view is that the struggle for the perfect welfare system, with the perfect mixture of public and private elements, is not without consequences. The output of the system will cause a re-balancing of the social order itself. In this way the definition of public interests (the 'what question') is closely connected to the way these interests are organised (the 'how question'). This point is particularly relevant in view of the public values failures, referred to by Plantinga in part A of this study: when welfare states do not live up to their promises public support for social security will wash away.

Law

Albertjan Tollenaar's contribution focuses on the law as an instrument of the public interest. The key-mechanism of law revolves around individual rights and obligations. These arise either from legislation or from contracts. When the source of individual social security entitlements can be traced back to legislation, then it can be said to be public; contractual entitlements belong to the realm of private social security.

The regulatory welfare state constitutes a mixed legal sphere in the sense that contractual relationships are conditioned by the statute and by public institutional safeguards. In labour law this regulatory model has actually been the preferred 'mode of governance' ever since it came into being. An example of such mixed forms of legal governance can be found in the area of statutory sick pay. Many (national) systems of social security lay down an obligation for the employer to continue payment of wages during illness. If the employer and employee have a dispute regarding the question of whether or not the employee is actually ill, there is often a public provision to settle these disputes. Either by enabling the employer to call in the public medical advisor to re-assess the claim (as in the German system), or by obliging the employee to call in the public medical advisor before he institutes an action to recover back wages (as in the Dutch system).

Indirect public interference may also affect the institutional setting of social security. The obligatory works councils in the middle and larger companies and the clients' participation councils in the semi-public institutions are two examples. The obligatory complaints procedure can also be regarded as an institutional provision. With these institutional provisions the legislator indirectly safeguards public interests, by enabling the clients, employees or citizens to protect their interests.

In Tollenaar's view mixed structures are complicated because they blur competences of private parties and public agencies. They also disturb the process of full judicial review which has come into being in the classical public domain. In the political process leading to forms of privatisation measures the consequences of these measures for the process of judicial review are often not fully considered, or are just taken for granted. Tollenaar regrets this because in the regulatory model the public interest relies very heavily on legal guarantees which are formulated by the legislature. Citizens should then be able to fall back upon an easy and transparent procedure to invoke these guarantees in individual cases.

Philosophy

The last contribution by Pauline Westerman, professor of Philosophy and Law in Groningen University can truly be considered the grand finale of this study. It contains an autonomous analysis of the problem of safeguarding the public interest in the welfare state.

Westerman's first line of reasoning deals with the characteristics of the public interests in general. In her view there are three normative elements to be taken into account: inclusiveness, explicitness and abstraction. The public space should

be *inclusive*, in the sense that different opinions, rules, values and interests are taken into account. It should coordinate these differences on the basis of rules that are *explicit*, clear and precise and which can therefore serve as criteria for justification as well as criticism. Finally, the categories used as well as the rights and duties attached to them should be *abstract*. They should abstract from the particularities of the individual persons and circumstances in order to arrive at shared meanings.

The second strand in Westerman's line of reasoning is that by its very nature the welfare state jeopardizes these three characteristics of the public sphere. The distribution of socio-economic burdens and benefits turns the state into an interested stake-holder, and, consequently, the distinction between rights and favours tends to be blurred. Beneficiaries of the welfare state risk losing their abstract title of citizenship: they will be addressed and regulated as people with particular needs and interests. Finally, the need to draw fine distinctions according to different needs and interests, leads to an ever-growing body of excessively detailed rules.

Westerman's third point is that the introduction of the regulatory welfare state does little to solve the problem of the defence of the public sphere. The regulatory welfare state shifts this to a multitude of more or less 'self-regulating' bodies, boards and committees. One of the problems with this is that the virtue of abstraction cannot be attained in this fragmented landscape. Each of the institutions and bodies are organised around a single aim. These functional regimes hardly interact and there is little room for coordination. Another problem with these specialized agencies is that they take into account only particular interests thereby not meeting the demands of inclusiveness.

Finally, Westerman comes up with a couple of solutions to solve this inherent problem of the (regulatory) welfare state. She argues for more transparency in the process of rule making by specialized agencies, more co-ordination between the various sections and actors involved in the welfare state and new constitutional guarantees for the separation of powers, for example ruling out the possibility that subsidies are used to enforce other policies. In between these lines there is some doubt whether these remedies will be strong enough to fix the problem. The complexity of the matters regulated by the welfare state led to a situation in which explicitness can only be attained at the cost of abstraction, and inclusiveness can only be attained at the cost of explicitness, whereas all three are affected by the apparent inability of the official domain to retain its impartiality. According to Westerman we should not take this situation for granted. Where discretion comes in place of explicit rules, and where impersonal roles are particularized, rights sooner or later turn into privileges that can be suspended at will.

5. CONCLUSIONS

5.1. SOCIAL SECURITY AS A PUBLIC INTEREST

So what conclusion can be drawn from this exercise? Let us go back to our central question: is social security a public interest and how does the answer to this question reflect on the role of the state?

We can conclude with some confidence that social security *is* a public interest, although different disciplines give different explanations and employ different (but overlapping) notions of what the public interest is. Economists see social security as a neutral instrument (or perhaps one should say: a 'necessary evil') for bringing welfare to the masses. Public administration views it as an expression of underlying values within the community. The law just proclaims that social security is a public interest, by defining it as a responsibility of the state. Philosophers consider it as an expression of justice.

There seems to be a basic consensus that the state cannot easily be disregarded. As to economic theory, it must be borne in mind that privatisation is argued for only as a correction of the public system, not as a substitute. It is not very likely that the big achievements in terms of solidarity between the rich and the poor, between the young and the old, etc. could have been realised without any direct government interference, e.g. without creating a social assistance scheme or introducing mandatory social insurance. This economic truth has implications for the legal sphere. When the state assumes responsibility for social security, it must see to it that an effective social security system is developed. Lawyers and economists agree: when markets fail, the state should step in. Furthermore, when public administration points at the interdependence between the strength of the welfare state and public support for it, this is not necessarily a neutral thing. Such interdependence can equally be interpreted as an imperative for the state to maintain a comprehensive welfare system. Finally, leaving aside the libertarian misgivings, most philosophers engaged in questions of distributive justice would consider some form of state interference necessary and legitimate. Even the *Rerum Novarum* (Pope Leo XIII 1891/1939) with its strong preference for corporatism, would accept the case.

5.2. SOCIAL SECURITY AND PRIVATE RESPONSIBILITY

While social security is thus considered to be a public interest, none of the disciplines argues that social security is *exclusively* a state affair. Economists welcome privatisation measures in order to counterbalance public sector failure.

For public administration, the division of responsibility between the state and the individual depends on the underlying values that prevail in a particular society. Lawyers argue that formal state responsibility for social security does not rule out the involvement of private and collective arrangements. And finally, philosophical thought, both in its libertarian and its communitarian forms, provides arguments in favour of non-state solutions for realising social security. In other words, most observers agree that social security is neither fully public, nor fully private. This makes it easy to subject the system to mixed governance structures. Indeed, such structures have a long tradition in the social security systems in many countries, in particular those where employers and employees worked together in corporatist institutions. As Tollenaar points out in his contribution in part B of this study many of these corporatist institutions have private roots but operate within a public law framework. Mixed governance structures are not unique to social security. Many policy areas in which the state has to provide services share this characteristic. From public transport to environmental issues, from energy supply to working conditions, one can see the same situation: the state has to provide a certain level of services, and holds itself responsible for the provision of these services, but needs private mechanisms or private actors to fulfil this responsibility. In social security there is an additional explanation. The roots of social security frequently stem from private relationships, e.g. in civil liability for industrial accidents, in the labour contract between the employer and the employee, in voluntary mutual funds for workers, or even in family relations. As a consequence, many arrangements for income protection are still somehow vested in these private relationships.

5.3. DIVISION OF RESPONSIBILITIES BETWEEN THE STATE AND OTHERS

When it comes to the question of how the role of the state must be defined *vis-à-vis* private responsibilities, our consensus starts to falter. The exact division of responsibilities is a question of political preferences, of ideology and of vested interests. It cannot be determined by academics. On the other hand, in our eyes, one should try to move away from simplifications of the truth and stereotypes, as if any change in governance should be seen either as a neo-liberal conspiracy or as a capricious socialist move. The debate should take into account that a strict public/private divide corresponds less and less with reality. In between the extremes of fully public systems and fully private ones there are endless shades of nuance. Occupational social security schemes have been public/private hybrids from the outset, and nowadays, in all branches of social security, new forms of 'mixed governance' have been introduced. As was mentioned earlier, the reality reflects a mix of public, occupational and private approaches. Many measures which have been introduced under the umbrella of liberalisation and privatisation

have not resulted in less but rather in different forms of governance. The challenge now is to understand how the new forms of 'mixed governance' work towards safeguarding the public interest.

5.4. CLOUDS ON THE HORIZON: THE INSTRUMENTALISATION OF THE PUBLIC INTEREST

Our contributions in part B dealing with the instrumentalisation of the public interest should cast some light to the latter question. It does so, but in a somewhat disconcerting way. All authors suggest that instruments which are based upon a public/private mix are problematic. For example, according to Nentjes & Woerdman it is difficult to establish well functioning semi-markets in social security; they even allege that perfect semi-markets can probably never be realised. Ko de Ridder warns us of the many factors to be to be taken into account which determine the success of public/private solutions: the attitudes of officials, the trust between organisation and the balance within the system itself. Tollenaar complains that public/private instruments blur competences and negatively affect the process of judicial review. And finally, Westerman argues that the inherent problem that the welfare state has with maintaining a strong public sphere is even more manifest in the regulatory state model. It makes one wonder whether the regulatory state is a viable concept for social security in the first place.

5.5. THE REGULATORY WELFARE STATE: A VIABLE CONCEPT?

This question can also be posed in different way. Are there any alternatives to the regulatory welfare state? Going back to an old fashioned all embracive public system hardly seems to be a desirable solution as this would give rise to the same public sector failures that prompted the move to the regulatory model in the first place. An alternative could be that the state withdraws from the welfare state to such an extent that a solid and clearly recognizable minimum package of services remains: a public, basic social security system. This model presupposes that the citizen and private enterprise should take full care of the extra-minimal protection themselves. In this way the divide between the public and private domain would be restored automatically. In our eyes this second alternative is neither realistic, nor attractive. It bears resemblances to the *minimal state* ideology. Whether this approach is capable of meeting the high demands of the modern welfare state remains to be seen. And when the private sector fails, there will be immediate calls for more regulation and collective solutions which are characteristic of the new regulatory welfare state.

So whether we like it or not, the regulatory welfare state is likely to stay. If this is true we had better do our best to make it work. What are the good practices and why were they successful? Our informants in part B of our study do not always touch on this question; their apprehensions are rather related to systematic and organisational difficulties which arise from mixing the two distinct traditional forms of governance, but not to empirical notion of 'success'. This gives rise to the question whether the regulatory welfare state requires a new theoretical framework which is capable of transcending the public/private divide and which is consequently better equipped to study the hybrid reality. We will come back to this theme in the last chapter of this study where we make some recommendations for further research into the phenomenon of *social markets*.

PART A

SOCIAL SECURITY AS A PUBLIC INTEREST

THE PUBLIC INTEREST IN SOCIAL SECURITY: AN ECONOMIC PERSPECTIVE

Andries Nentjes and Edwin Woerdman

1. INTRODUCTION

In its publication on safeguarding the public interest, the Dutch Scientific Council for Government Policy (WRR) defined the public interest very broadly as any societal interest that has been made the objective of government policy.[1] Applying that definition, social security is one of the domains of societal interests for which the government has taken responsibility. From an economic point of view, the objective of social security policy is basically (a) to provide economic security for citizens against the mishaps in human life, including a basic level of income, (b) while avoiding unnecessary high costs to society. Although it perhaps takes an economist to explicitly mention the latter part, hardly any politician will deny that containment of societal costs is as much in the domain of the public interest as delivering services of good quality. The political challenge is to find the balance between, on the one hand, the benefits of providing security where it is needed and, on the other hand, the sacrifice that is involved.

From an economic perspective, the broad definition the WRR has given to the concept of public interest is not really satisfactory. It does not give any clues as to when and where the government should act to further or restrict its provision of social security and when and where it should not act. The WWR fails to provide guidance for demarcating domains and seems to accept that political decision makers draw the dividing line between private and public sector wherever they see fit. In this chapter we shall take a different approach and start with proposing economic criteria for demarcating the public interest domain in social security. Our insights are applied by studying the development of social security in the Netherlands.

[1] WRR 2000, p. 20–21.

This chapter is organized as follows. Section 2 defines the concept of the public interest based on an economic approach. Section 3 identifies a market failure that provides the economic argument as to where the government should be involved, and where it should not be involved, in providing income support and care financed through social insurance or taxes. Section 4 discusses the economic-political life cycle in social security. Section 5 focuses on public sector failures that hamper the efficient provision of social security. Conclusions are drawn in section 6.

2. AN ECONOMIC DEFINITION OF THE PUBLIC INTEREST

Before we define the public interest from an economic perspective, we have to say a few words about what economics actually is and what an economic perspective on social security thus entails. To explain this, it is helpful to understand that the economic system of the Netherlands is of the 'mixed economy' type: basically a market economy with a government stepping in when and where the market fails to provide in the needs of citizens. Economic science teaches us that the market is the most appropriate mechanism to satisfy human needs for private goods; that is, goods that can be individually owned. The agreement to transfer the property of a private good is a matter solely between buyer and seller, who both expect to gain from the transaction. Others remain outsiders to the contract. They have nothing to do with it and they are excluded from using the good.

In contrast, the use of *collective* or *public goods* has to be shared with others. The Dutch textbook example is a dike to protect a population and its properties against high water. Procurement and maintenance of such a good needs a common decision and an organisation to implement it: the prototype of a government. The basic public goods are the provision of 'law and order', including the rule of law. Without the provision of these essential public goods a thriving market economy could not even exist, since protection of property rights and compliance with contractual commitments are the fundaments on which the market is built. Although in real life the distinction between public and private goods is not a simple matter of black and white, the conceptual difference does provide criteria for delineating the public interest domain from the sphere where the government has no responsibility.

If one accepts that the market is the basic mechanism for providing the goods and services society demands, it follows that a government which intends to pursue the public interest faces a restriction on what can be the objective of

government policy. When and where the market functions properly in supplying the goods and services citizens need, the government should abstain. Safeguarding the public interest by providing security against the mishaps of life by way of public sector intervention is in place when and where the market fails in delivering security. Market failure can be due to the fact that a good is not purely private, but to some degree public. Another source of market failure is lack of competition. It will lead to prices that are too high relative to their quality. The market will also fail when consumers are ill-informed and incapable of assessing the value of the product.

To identify and assess market failures, economists investigate the impact of market arrangements on the welfare of society. Citizens have wants they aspire to satisfy. They make sacrifices to get the goods and services they need and which are beneficial to them. Economics brings the sacrifices and the satisfactions under the measuring rod of money. Satisfaction or benefits is expressed as the maximum amount of money a person is willing to pay for the object of desire. The efforts and sacrifices or costs to bring the object forward are also measured in terms of money. What counts are the net benefits or surplus: the benefits obtained minus the costs made. A market failure is a failure because the market arrangement does not bring in the full net benefits. And a public sector arrangement to correct the market failure has to provide higher benefits than costs. Some will win, others may lose as a result of the intervention; but if the benefits exceed the costs, the losers can be fully compensated without depleting the benefits and net gains will remain some. In that case, economists say, the criteria of 'potential Pareto efficiency' is satisfied, meaning that the winners could, in principle, compensate the losers.[2]

From all this, it follows that the economist will define the public interest as maximizing net benefits to society. Governments should focus on constellations and developments that threaten the maximization of net benefits and look for options to redress them. Government interventions with intentions other than increasing societal welfare cannot be defended from an economic perspective as being in the public interest. Applied to social security, the economic prescription is that the government should identify the market failures in providing security and create net benefits by designing and implementing a social security policy that corrects the market failures. In the next two sections we shall see whether the government has indeed followed the prescriptions of economic science and focused on intervening where the market failed to provide an adequate level and quality of social security.

2 E.g. Hochman & Rodgers 1969.

Apart from the question whether or not the correction of market failures has been the major reason for drawing social security into the public interest domain, it is evident that the involvement of the national government of the Netherlands in social security insurance and in providing safety nets for the uninsured has expanded immensely. It expanded from next to nothing a hundred years ago to about 10% of net national income in 1960, to 27% in 1980 and 30% in 2008.[3] Unfortunately, not only markets can fail, but governments can fail too. The ambition is to build and maintain a high quality, efficient and balanced system of social security. However, in this process, inefficiencies and imbalance between the benefits and the costs of social security may turn up. Instead of being the solution to market failure, the public sector then has become (part of) the problem. If this occurs, the public interest in social security has to be redefined as identifying the public sector failures and creating net benefits by redressing them. In the next sections we shall see whether actual developments in the Netherlands correspond with our economic prescription of the public interest. Has the view on what the public interest in social security is changed and have public sector failures been perceived and corrected?

In sum, the economist's view on what the public interest in social security is, has been defined as (a) correcting the market failures in the private provision of security as well as (b) identifying and correcting the public sector failures in the public supply of social security. Our definition of the public interest corresponds with the approach of Teulings, Bovenberg & Van Dalen (2003), but rather than focusing on externalities and market failures in general, we introduce the concept of so-called 'caring externalities', as we will explain below, and perhaps lean even more heavily on identifying and remedying public sector failures. In other words: one could say that our economic approach is the same as that of Teulings, Bovenberg & Van Dalen (2003), but there are some differences as to how the economic view is worked out, basically since we focus on the development of one specific sector. The task in the next sections is to investigate how suitable this economic interpretation is in presenting and understanding actual developments in social security. Do the decisions taken by the government match the 'idealisation' of economic theory? We shall give our verdict in the final section of this chapter.

[3] For 1960 and 1980 data see Nentjes 1989. For 2008 calculations are based on data from CBS (Statistics Netherlands): *Sociale beschermingsuitkeringen as percentage of netto nationaal inkomen*.

3. MARKET FAILURE AND THE EMERGENCE OF SOCIAL SECURITY

In the previous section, the public interest has been defined as maximization of social-economic welfare. The government can pursue that goal by correcting market failure, where it emerges, as well as by avoiding and redressing public sector failure. In this section we shall apply those concepts to the domain of social security. We will argue that the market as well as other types of voluntary action fails in translating solidarity, which exists among citizens, into a provision of security for those who need it. The defects in the private organisation of solidarity lead to a loss of social-economic welfare and demand the government to step in. Subsection 3.1 focuses on the economic theory of solidarity and subsection 3.2 on applying the theory to The Netherlands. Subsection 3.3 addresses the types of government involvement in social security that came into existence for reasons other than correcting market failure in the organisation of solidarity. Subsection 3.4 provides an interim summary.

3.1. CARING: AN ECONOMIC THEORY OF SOLIDARITY

In his *Theory of Moral Sentiments* (1759), Adam Smith noted that normal human beings have the innate capacity of sympathizing, based on the ability to see oneself in the position of the other. As a result, a person is not indifferent to another's suffering, which makes him willing to help and support others. In 20th century politics this notion has evolved to the idea of solidarity. Modern economics has conceptualized the phenomenon as a special type of externality. Positive externalities are the enjoyment of benefits created by others for which one pays less than the costs or for which one pays nothing at all. Negative externalities are the damage and suffering one undergoes without being compensated by those who caused it. Applied to social security issues, the negative externality is, for example, the lamentable state of individual A that makes individual B feel less well. Spending money on help for A will raise the well-being of B. There is a voluntary transfer either in money or in kind that raises the welfare of both receiver and donor. The 'caring externality', as it is called, is 'internalized'.[4] In the past care for orphans, poor elderly people, the sick and the invalidated came from private action as a result of the charity of the local aristocracy, churches, religious orders and civil organisations. Donations or provision in kind were voluntary. Only the 'deserving poor' were eligible for support and had to be distinguished from the undeserving, namely those deemed capable to earn their own income through work but being perceived as unwilling to do so.

4 See e.g. Collard 1978; Culyer 1980; Nentjes 1989; Barr 2004.

One can view the interaction between caring citizens and people in need as a type of market. There was a demand for solidarity or caring from the side of the needy met by supply from the side of the donors. History shows that the market for care did work, although it also provides ample proof that coordination was far from perfect. Caring citizens could observe that many people in distress remained without adequate help. The public debate in the second half of the 19th century shows an increasing dissatisfaction with the way charity was functioning, even in spite of earlier reforms. In other words: market failure was perceived.

The major problem undermining the private provision of charity is its public good property. When a public good is supplied, many enjoy the benefits: the persons that made sacrifices for its production, but also those who remained inactive. The same is true for charity. Free-riders are glad to see that needy persons are supported without sharing in the cost. It undermines the incentive to contribute voluntarily. Such disincentives may be weak in relatively small communities where potential donors know each other and where the reputation of taking one's share of a common burden counts. However, the disincentives are stronger in large cities, and even more so at a national level, where free riders remain anonymous. Therefore scaling up from differentiated local provision to a uniform national scheme increases the problem. The caring person is willing to pay, but his actual payment will suffer if he sees that the good is supplied anyway and that his personal sacrifice hardly makes a difference. Considering society at large, there is a willingness to pay, but only a part of it can be extracted from the potential donors. As a result, caring externalities are not fully internalised and the supply of care motivated by altruism falls short of the efficient level of full internalisation. From an economic perspective this means a loss of welfare (or: a loss in net benefits). A leakage, if you will, that should be repaired.

Fundamentally, the problem of a shortfall in the supply of charity is similar to the disincentive for the voluntary production of a classic public good, such as law and order. The solution that emerged in history is also similar. Where gaps in the provision of charity were visible, the public authority stepped in. To prevent the situation in which free-riding undermines social care, citizens accept that contributions to finance its provision are collected from those who are financially able, if necessary by using force. Local governments were the first to do this. Orphanages financed by the local authorities have a history of centuries. In the Netherlands, the first national legislation on poor relief dates from 1800,[5] although national schemes of social security with uniform eligibility criteria entitling individuals to uniform benefits, and financed through income-dependent insurance contributions or taxes, were built up much later, in the second half of the 20th century. The economic argument for public sector

5 Postma 1995.

involvement is a threat of market failure if the redistribution of income from rich to poor, based on caring, were left to the market. Active government intervention is required to avoid market failure and to ensure adequate social care. In other words: voluntary redistribution of income meets the economic definition of the public interest.

The economic approach has often been criticized for its narrow perspective. Economists that are interested in how social security can contribute to maximum social-economic welfare seem to confirm that reproach. Also the definition of caring as willingness to give seems to reduce solidarity to solely a set of preferences that might change in a whim. It is not our intention to deny that economics, as a mono-discipline, is narrow. However, this weakness is also an advantage when it comes to precision in argumentation. But what matters most here is the question whether this narrowness in scope is a barrier to, or even blocks the contributions from, other sciences to the study of social security. In our view, the various approaches are basically complementary to economics and not a substitute. Economics takes solidarity seriously, not purely as a battle cry, moral obligation or fundamental human right, but as a phenomenon that really exists and has to be organized. Economics does not analyze where solidarity or care comes, which is more the domain for other sciences. Those sciences may look at its religious and moral roots, its base either in natural law or in principles of social justice, which make solidarity a commandment of a higher order. Social conventions also play a role. In a uniform society, social cohesion including solidarity may be stronger than in a fragmented and heterogeneous population. The public debate on such issues affects the sentiments, the convictions and the role models that underlay solidarity. The willingness to give may be mixed with self-interest, because a person may see the well-conceived organization of solidarity as a form of self-insurance for himself and for his close relatives, just in case ill-fate should strike. Or one may either hail or condemn redistribution as an instrument to maintain the capitalist order of society. The biologist may study how solidarity evolved in the survival of the fittest. Psychologists could research whether altruism is basically a display of fitness to impress the other sex. Some of these views and approaches may compete intensely with each other. Economics accepts the arguments as efforts to underpin the phenomenon of solidarity, which the economist – in all his narrowness – sees as an existing scarce good in the public interest domain.

Even more relevant than the issue of whether the economic approach is too narrow is the question whether the economic theory described above is of any use in explaining the real world. It has a theoretical and an empirical component. The theoretical question is whether the transfers of income in society indeed are a reflection of underlying solidarity and willingness to give. Instead of seeing

consensus the alternative theory views redistribution as a symptom of social conflict.[6] Redistribution is then supposed to be involuntary. In a democracy, the majority of voters, with incomes per person below a given level, have the political power to extract 'surplus' income from the minority earning higher personal incomes against their will: the Marxian notion of exploitation turned upside down.[7] Although constraints such as 'voting with the feet' by emigration of the rich, capital flight and negative economic repercussions will mitigate the degree of exploitation of the 'rich' by the 'poor', involuntary redistribution is a possibility that cannot be excluded *a priori*. Considering the political economy of redistribution, one can also think of potential political coalitions. Middle incomes hold the key. In a two-party system the median voter makes the difference between winning or losing elections. In a multi-party system a coalition without participation of the middle is difficult to form. Noting that the highest 'rents' can be extracted from the rich, Tullock (1971) predicts that low and middle incomes will collude to take from the rich, where middle incomes benefit proportionally more thanks to their strategic position.

3.2. SOLIDARITY IN THE NETHERLANDS

A major empirical question is: what do we know about the actual redistribution in the domain of social care? Is it plausible that this redistribution is fully based on the caring and voluntariness of those who make the net contributions? To answer the first part of the empirical question about actual redistribution, the most informative publication is, in our view, written by Ter Rele (2005). He shows which groups benefit from and pay for diverse public arrangements in the Netherlands. The information in table 1 refers to the arrangements existing in 2003 and 2004. They encompass a broader category than narrowly defined social security and include the benefits from public housing arrangements and benefits in kind from private goods that are provided for free, such as education. The transfer column consists mainly of social security expenditure. As one can see, they are more or less evenly distributed over educational classes. Benefits in kind are dominated by the cost of education. It explains why higher education levels have the highest benefits. In housing arrangements, low incomes benefit from rent subsidies and high incomes and even more from tax exemption for interest on mortgages. In total benefits there is no systematic differentiation between the educational levels. The group with only higher secondary education has the lowest benefits; 10% less than persons with basic education only and almost 30% less than those with university education, who have the highest benefits. The

6 E.g. Nozick 1974.
7 Downs 1957.

most striking fact is that overall the differences in total benefits between the educational categories are not big.

Table 1. Total lifelong benefits from collective arrangements (present values, in thousand euros)

Education class	Transfers	Benefits in kind	Housing arrangements	Total
Basic education	86.7	167.7	17.8	272.2
Lower secondary	85.1	158	14.6	258.5
Higher secondary	85.5	150.5	15.7	251.7
Intermediate vocational	85.6	171.2	14.6	271.4
Higher vocational	88.5	166.2	27.5	282.2
University	88.5	197.9	35.2	321.6

Source: Ter Rele 2005, table 4.4, p. 30

However, the picture changes if the payments for the public expenditures are included. Income taxes and value-added taxes (VAT) rise with educational level, as is shown in table 2. A relatively equal distribution of benefits in combination with a progressively increasing contribution to the costs of the arrangement leads to vertical redistribution.

Table 2. Lifelong income, benefits and taxes (present values, in thousand euros)

	Net labour income	Total benefits	Taxes	Taxes as percentage of benefits
Basic education	294.1	272.2	155.6	57%
Lower secondary	384.5	258.5	204.5	79%
Higher secondary	554.0	251.7	302.0	120%
Intermediate vocational	569.9	271.4	304.0	112%
Higher vocational	769.6	282.2	421.3	149%
University	1043.7	321.6	569.4	177%

Based on: Ter Rele 2005, tables 3.1, 4.4 and 5.1.

The two lowest levels in education receive on average per person more in benefits over their lifetime than is paid in taxes. They can be supporters of the caring state for selfish reasons. The call on solidarity starts at the level of the middle group: individuals with higher secondary and intermediate vocational education pay over their lifetime 10 to 20% more in taxes than they receive in benefits. From people with higher education considerably more is expected. They have the

highest total benefits, but that is far surpassed by higher taxation. There is a systematic and substantial redistribution from the 'rich' to the 'poor'. The net lifelong payments for people with a university degree are 247.800 euro. On the contrary, the group with basic education has positive net lifelong benefits of 116.600 euro.

The question, posed above, was whether all that redistribution is voluntary, based on the caring of the citizens who make the net contributions. If so, the result is a so-called 'Pareto-efficient' redistribution, since it leaves some better off and no-one worse off.[8] The figures of table 2 show that a substantial vertical redistribution indeed exists in the Netherlands. Still the question is whether it is an expression of solidarity or evidence of involuntary transfers and social conflict.[9] Remarkably, no empirical research has been done in the Netherlands to test the competing theories. However, by constructing table 3 we can give an indication. In the table the educational levels, which correspond with lifelong income levels, have been aggregated to three classes. The same has been done for taxes plus social premiums as a percentage of the lifelong benefits of various arrangements. In the third column we add our calculation of the percentage of voters in each class (based on CBS data).

Table 3. Tax-benefit ratio per group of voters

Educational and income level	Percentage of all voters	Tax-benefit ratio
Lower	38%	69%
Middle	38%	114%
Higher	24%	158%

Source: Ter Rele 2005 and CBS data for 2004.

From table 3 one can conclude that a simple political–economy model with a low income group exploiting a high income group is a democratic impossibility. There is no majority of voters to support that option. A coalition is thus necessary. Neither is Tullock's postulate supported by the evidence of table 3: middle incomes do not profit excessively from a coalition with the low income group to exploit the rich. On the contrary, middle incomes turn out to be net contributors. The figures suggest that instead of exploiting their median voter position to extract high net benefits through redistribution, the middle income group shows solidarity or, in other words, 'caring' by co financing the low income group's consumption of welfare arrangements. It seems a plausible conclusion, since the degree of revealed caring of middle income receivers is a modest 14%. The call

8 Hochman & Rodgers 1969.
9 E.g. Nozick 1974.

on the high income group is considerably larger: 58%. On the one hand, one can have doubts as to whether such a high contribution would be offered on a voluntary basis. On the other hand, it seems not unreasonable to presume that the high income's degree of caring might exceed 14%. In conclusion, table 3 inspires our reasoned guess of a mixed picture: a considerable part of vertical income redistribution is voluntary and another part, in particular a fraction of the net contributions of the high income group, is involuntary.

We have argued that voluntary redistribution, based on solidarity enhances social-economic welfare and for that reason satisfies the economic definition of public interest. For involuntary redistribution it is different. Involuntary redistribution has benefits for those who receive and costs for those who are forced to pay. Economic science offers no criteria to judge whether the transfer in itself is a good or a bad thing. As a participant in the political arena, the economist may support such policies for social reasons. As a professional economist he will see that next to the direct benefits for those who receive and possibly the indirect positive economic impacts there is also reason to worry about the negative impacts on the economic incentives of those who are forced to pay and on the negative repercussions on national income.

In subsection 3.1 we have defined the public interest in social security as the organisation of solidarity by a public body. The figures presented in subsection 3.2 can be interpreted as evidence of the existence of solidarity in Dutch society, although they do have the backdrop of including a wider set of transfers and domains of government intervention than social security alone. To get a more precise picture we shall try to identify the types of social security that meet the criteria of voluntary vertical redistribution, using The Netherlands as the test case. In subsection 3.3 we shall therefore turn to types of social insurance that do not meet the criteria to find out what the motives have been for their coming into existence.

Social security in the strict sense of the public provision of security by way of vertical redistribution of income has its origins in poor relief provided by local governments. Orphanages financed by the local authorities have a history going back centuries. In The Netherlands the poor law of 1800 was the first effort to establish national rules for the implementation and oversight of poor relief.[10] In practice, the support of the needy remained in the hands of local church foundations during the full length of the 19th century, despite complaints, mainly from the liberal bourgeoisie, about its ineffectiveness. On the one hand, there was the failure to provide the necessary minimum due to lack of means in times of economic hardship. On the other hand, there was abuse of the system by

10 Postma 1995.

people receiving benefits from more than one church or private charity. As the 19th century progressed, the involvement of local governments steadily increased, mainly because of the necessity to provide supplementary benefits. Yet it was not until 1912 that a new poor law brought a reorganization of the field by establishing minimum benefits, while making local governments responsible for implementation. About fifty years later, in 1965, the General Assistance Law brought a national uniform arrangement that made poor relief an entitlement of Dutch citizens with an income below the poverty line. The level of benefits was related to the net minimum wage and the conditions for those receiving the benefits were lenient. Benefits were paid by local governments whose expenditures for poor relief were financed by national tax revenue.

As we will describe more thoroughly in our chapter on the instrumentalisation of public interests, the year 2004 brought a new Act on Work and Assistance with eligibility criteria and obligations that are far less lenient, but the arrangement remains tax financed. For other types of need, such as those arising from the high cost of health care and other care, or from lack of income due to old age or invalidity, another solution has been found. The arrangements were introduced in the period after the Second World War and all have the form of mandatory social insurance for every Dutch citizen. Entitlements to benefits are equal for all. Insurance contributions are proportional to taxable income up to a maximum. So transfer of income from people in the higher income brackets to lower income groups is an inseparable part of the schemes. Mandatory public insurance against loss of income due to old age dates from 1957, a similar insurance against high-cost medical risks (Act on Exceptional Medical Costs) came into force in 1968, and national insurance against the costs of health care (Care Act) in 2007. If our reasoned guess is right that vertical redistribution is largely supported by the caring motive or is accepted as collectively organised self-insurance, one can regard the social security arrangements as corrections of market failure, contributing to social-economic welfare and therefore as being in the public interest.

3.3. MANDATORY INSURANCE FOR WAGE-DEPENDENT WORKERS

This section discusses the emergence and growth of social security in The Netherlands in support of wage-dependent workers. To detect the public interest dimension we have to investigate to what extent market failure in the coordination of solidarity or care played a role and which other considerations have motivated government intervention.

Individually unpredictable incidents – loss of work, illness, invalidity and living long – that lead to loss of income or extremely high expenditures, are a fact of life. Through the ages the extended family and close knit local communities, with their social norm of mutual help, offered informal insurance, protecting its members against the economic consequences of individual misfortune. The more successful and lucky ones had a capital buffer of their own, built up through saving or acquired through inheritance. People without financial buffers could try to take up private insurance against such risks as costs of health care and loss of income due to illness, invalidity and old age. As a last resort one could appeal to individual or organized charity. Due to the rise of factory labour and the growth of an urban proletariat – in the Netherlands from about 1870 onwards – the traditional private systems of support for people in economic difficulty were crumbling. Wage-dependent workers were too poor to create a financial reserve and begging for charity was shameful. However, insurance was becoming an option for workers with a fixed labour contract. This was provided by workers' organisations in specific branches of industry, but also and increasingly by employers, for a mixture of motives, such as attracting and binding competent workers, disciplining employees through monitoring, and possibly also because of caring considerations. Next to that, commercial insurers began to appear on the market.

The intermittence of prosperity and depression in the industry brought new uncertainties for workers about the continuity of employment and income. In Europe the bourgeoisie became better informed about the often appalling conditions under which labourers and their families had to live, even if they had regular work. There were great worries about the poor quality of the Dutch labour force compared to neighbouring countries. For those of the middle and higher classes who were willing to look, the sufferings of the incapacitated and ill unable to work, of capable workers unable to find work, and of old people living in poverty were visible enough in cities. The 'social question' became a subject of public debate and appeared on the political agenda. By the end of the 19th century, it had become politically widely accepted that there were serious defects in the provision of security for the wage-dependent part of the population and that the government could not abstain. A substantial part of the organized workers brought their discontent to the fore as a political outcry against capitalism, that is, against the market economy: a potential political time bomb. The concentration of the labour proletariat in towns and cities had become a political force well before the extension of the political vote and it was even more so thereafter when the circle of those allowed to vote and be elected was gradually widened.[11] And not to forget, opinion leaders and politicians were well-informed

11 Schwitters 1991 (see also his references to the literature); Woerdman 2009.

on how in 1884 Germany had responded to similar problems with its 'Bismarck' scheme of social security legislation.

From the above story one can distil a range of reasons explaining why the government started to intervene in the labour market. But was this a reaction meant to correct market failure? Or were other considerations involved? For an answer, one has to look at the specific laws that successively came into being in the Netherlands. The very first 'social' law of 1874, regulating labour by women and children, aimed to protect those deemed unable to protect themselves from abuse. Welfare economics is based on the premise that individuals can make their own choices – and they should have the freedom to do so as long as their choices don't cause damage to others. Not being able or not being allowed to make one's own deliberate choices can therefore be viewed as a market failure justifying corrective regulation. The second public interference – labour inspectors monitoring and reporting on working conditions in the industry – had its start in 1891. The view underlying the law clearly was that workers were lacking the power to obtain safe and healthy conditions of work from their employers. The employers' dominant position on the labour market might be viewed as a market failure, providing an argument for government intervention. The labour inspectors were a light form of regulation, mainly taking effect by way of naming and shaming. The Workman's Compensation Act of 1901, establishing the first public insurance scheme, was of a more heavy calibre. Under private law the established legislation and jurisprudence on tort had been available to victims of labour accidents seeking compensation from their employer, but only if they were able to demonstrate fault. In practice very few cases came to court. However, voluntary insurance was on the way up and increasingly provided by employers. That makes it difficult to perceive a case of market failure here, offering an economic argument for governmental corrective action.

Yet at the time there was broad political support for public regulation. There was a demand for insurance from the side of emerging trade unions and socialist parties. Employers that already did provide insurance also lobbied for mandatory insurance, hoping to strengthen their competitive position against non-providers. Possibly the voluntary provision of insurance was rooted in employers' caring about their workers. However, using the political arena to force the non-caring employers to participate in the scheme hurts the Pareto-criterion that actions should be voluntary and for that reason it cannot be viewed as an appropriate correction of market failure, as we have seen. The Accident Law made it mandatory for employers to take up insurance against the financial consequences of liability for the incapacity of their workers due to accidents during work. The political discussion focused on the issue whether its

implementation should be left to employers and workers per firm or sector, or whether it should be centralized and entrusted to one public insurer. In the end the last option won. The next three social security laws – on Illness (1913), Incapacity (1913) and Old Age (1919) – also mandated the employer to take out insurance for his workers.

A common feature of the above mandatory insurance schemes is the equivalence between the insurance contribution paid and claims to benefits, similar to private insurance. Usually the contributions as well as the benefits were expressed as a percentage of the worker's wage. In principle the arrangements did not redistribute income vertically between workers with different wage levels. There is no straightforward evidence that considerations of solidarity or caring were involved. Social insurance arrangements for wage earners that followed later in the course of the 20th century – mandatory insurance providing income during unemployment (1949) and the mandatory insurance against loss of income due to incapacity to work (1966) – showed the same equivalence. The two exceptions were insurance providing children's allowances (1939) and insurance covering the costs of health care (1964): the insurance premium was income-dependent, while benefits for children were equal and for health care dependent on the medical bill. In the last mentioned arrangements solidarity considerations (either voluntarily accepted or imposed from above) evidently did play a role, although restricted to the group of eligible wage-dependent workers.[12]

Considering the features of total mandatory insurance for wage-dependent workers direct evidence is lacking that the arrangements were supported by considerations of care. However, we should not overlook the evidence of indirect support. From the last decades of the 19th century on there was political demand for this type of mandatory insurance, for various reasons as we have seen. Political supply followed. Economic theory teaches that the incidence of the insurance costs did befall on consumers (higher prices), on employers (lower profits) and on workers (lower net wages and lower employment). On introducing the new legislation that distribution of the burden appears to have been accepted. One can argue that employers and consumers, who did accept the outcome, exemplified caring for wage-dependent workers. One can consider it as evidence that in an indirect way solidarity did contribute to the emergence and expansion of social security legislation in the Netherlands.[13] Considering that wage earners themselves had to make sacrifices, and in the longer run perhaps had to bear the brunt of the economic costs, one may be tempted to suspect here caring mixed

12 In 2007 mandatory insurance against costs of health care for all citizens replaced the mandatory insurance for employed persons.

13 We did not come across the concept of indirect caring in the literature and give it its first try here.

with a stiff dose of paternalism: disciplining the spending pattern of labourers for their own good and for a good deal at their own cost. However, the social security legislation for wage-dependent workers was introduced with the support of the workers' representatives. So one can argue that it reflected workers' preferences as well: a voluntarily accepted restraint on spending patterns, or otherwise, a restraint accepted in return for the benefits of care.

Apart from the evidence of indirect care we could not detect other types of market failure providing welfare-economic arguments for mandatory insurance for wage-dependent workers. To make a case for market failure, arguments against voluntary private insurance have to be brought in. A well-known bottleneck in insurance is moral hazard – the insured person takes less care to avoid risks covered by insurance. However, mandatory social insurance offers no solution for that problem The second bottleneck is adverse selection, meaning that only 'bad risks' take out insurance. Commercial insurers counter the bottleneck by refusing to insure persons with high risks or charge them high contributions. However, the so-called 'bad risks' are usually the ones that are most vulnerable. That problem could have been solved by a targeted subsidy and by making acceptation mandatory for insurers: a much lighter form of government intervention than mandatory insurance with one public insurer. Suppose the government had chosen for such light regulation. Then voluntary private insurance based on equivalence, either as an ingredient of collective labour contracts or as an individual initiative, would have developed further, following the rather steady increase in wage income. This is exactly what happened to the voluntary insurance of employees against loss of income due to unemployment, before it was made mandatory in 1945.[14] With voluntary instead of mandatory insurance, coverage would of course have been lower and more workers would have taken recourse to the arrangements rooted in caring, discussed in section 4.1.

The conclusion is that social insurance for wage-dependent workers can at least in part be viewed as a government intervention coordinating indirect caring on the side of consumers and employers. If so, mandatory insurance safeguarded the public interest by correcting market failure in the care domain. Yet the costs of care for consumers and employers cannot have been high. We suspect that their solidarity was mixed with paternalism, and also presume that the representatives of the workers, perhaps the workers themselves as well, willingly accepted the discipline that forced workers to make provisions for the future and protected them against possible short-comings in caution. If one takes the view that, as a category, workers are adult persons, capable of making responsible

14 Van Loo 1992, p. 90–91.

choices, the alternative option of voluntary insurance emerges, complemented with light regulation to protect the most vulnerable workers.

3.4. SUMMARY

The question posed earlier with regard to the extent to which market failure has been a leading motive for the public interest in social security in the Netherlands has received a mixed answer. We have basically identified three driving forces behind social security legislation: voluntary redistribution to internalize caring externalities possibly mixed with preferences for public self-insurance, politically forced involuntary redistribution through social security and paternalistic correction of perceived lack of prudence of wage-dependent workers. Only in so far as social security arrangements have been based on voluntary redistribution can they unequivocally be classified as public intervention to correct market failure. And only insofar as social security services can be retraced to this motive, can welfare economics categorise the policy as safeguarding the public interest by increasing national welfare. As for the second and third motive, the judgement of whether public intervention has served the public interest depends on one's political views. Our tentative conclusion is that the vertical redistribution in the schemes of social security for all citizens is largely voluntary, supported by solidarity. However, in the social insurance schemes for wage-dependent workers, vertical redistribution is absent or weak. Neither is it clear what the failure in the insurance market is that needs correction. We did not find convincing economic arguments to classify social security for wage-dependent workers as being in the public interest.

4. THE ECONOMIC-POLITICAL LIFE CYCLE IN SOCIAL SECURITY

The national system of social security in the Netherlands was built up between the year 1900 and the 1970s.[15] In those years the gaps in existing social security supplied voluntarily through the market were one of the major political issues, hand in hand with the political urge to close those gaps through a form of government involvement.[16] Political discussions framed the public interest mainly in terms of the benefits to be reaped from an encompassing framework of social security, replacing the earlier ramshackle private arrangements.[17]

15 E.g. Nentjes 1989; Postma 1995; Roebroek & Hertogh 1998.

16 E.g. Woerdman 2009.

17 The notion of public interest in the political discussion should be distinguished from the definition based on economic theory.

Although in the process of building up the national system of social security the cost side was not totally neglected it is evident from the public discussion that the cost burden and its negative repercussions on the economy were not perceived as a major bottleneck and hardly as a component of the public interest in need of surveillance.

That rosy view changed very soon after the completion of the social security structure in the 1970s. Within a few years the political discussion on social security made a U-turn. In the face of growing evidence that the post-war decades of strong economic growth and full employment were over, most politicians began to accept from the late 1970s onwards that the steady expansion of social security had been and still was a major driving force behind the rise in labour costs. It was also widely accepted that the negative impacts on employment and economic growth were quite dramatic and had to be brought to a halt. Implicitly the concept of the public interest was redefined: instead of expansion and deepening of social security arrangements, the containment of their costs in order to save employment made the political agenda. The global political trend of the 1980s is best caught in Reagan's words on becoming president of the USA in 1981: 'Government is not the solution to our problem; government is the problem.' In the Netherlands, social security provided by the public sector started to be viewed no longer as the solution (to market failure), but as a problem (of rising costs). The public interest was defined now as spotting the public sector failures in providing social security.

The public sector failure had two dimensions. The first one was that many entitlements were seen as 'over the top' and no longer affordable. Curtailing the levels, for instance a lowering of employment benefits, was the remedy here: technically simple, but politically extremely difficult. The largest contribution to the reduction of public expenditure did indeed come from this source. The second dimension of public sector failure was inefficiency in the organisation of providing social security. In the effort to eliminate the waste of scarce resources, criteria for eligibility have been made more strict and other changes were enacted, among them the incorporation of market elements in the social security system. Most of the reforms and the motivations given reflect mainstream economic thinking on incentives and other causes of regulatory and organisational inefficiency. Section 5 gives a survey of the major types of public sector failure that may affect the public provision of social security. Illustrations will be taken from actual developments in the Netherlands over the past three decades.

In the first decade of the 21st century the government has continued its efforts to improve efficiency and to reassess the balance between the benefits and the costs of the various social security services. But one can also observe a reaction of

critical journalists, social and legal scientists as well as politicians who fear that cost containment actions have gone too far. The phrase 'paradigm change' has even been used: a switch from providing security and income protection to making social security subservient to economic interests, such as a well-functioning labour market.[18] The criticism often tallies with a distrust of – if not aversion against – the infusion of market elements in social security legislation. The critics tend to identify the public interest in social security with quality of service in supporting people in need and prevention of economic insecurity and anxiety. They recommended a caring public sector not driven by profit-making motives, and in particular not in health care, as the best approach to safeguard that public interest. Cost considerations do not seem to be much of an issue for them. Are these the first signals of a new and third stage in the political life cycle of social security? Probably not in the near future. The huge government expenditure made to counter the financial and economic crises from 2007 to 2010 and the consequent increase in public debt will urge a critical review of government tasks. Social security will not escape unnoticed. Looking further ahead one can only say that time will tell which way we are going.

5. PUBLIC SECTOR FAILURES AND THE REFORM OF SOCIAL SECURITY

Whatever the precise motives of the government may have been in becoming involved in the provision of social security to its citizens, the fact is that in the 20th century social security has developed as a public sector provision. Throughout its lifetime of about two hundred fifty years, economic science has focused in particular on how markets work and how they may fail, but also on how governments work and how they may fail. Public finance is about as old as general economic theory and in the past four decades an even more specialised branch of economics has emerged, called public choice, or (new) political economy. Among the other issues investigated is how the public sector can fail in his task of serving the public interest. The public interest is conceived here as maximum net benefits for all citizens. Public sector failure is creating or letting in existence public arrangements of which the net benefits are either lower than what could be achieved or even negative.

The literature has come up with a list of potential failures for organisations in the public sector.[19] In this section, the concept of public sector failures will be introduced and applied to social security to see how suitable they are for explaining the changes that have been made in social security after the U-turn of

18 Asscher-Vonk 2005.

19 E.g. Hanush 1983; Recktenwald 1980; Recktenwald 1984.

the 1980s when the focus of politics shifted from expanding and raising the level of social security to revisiting and trimming the system. The public sector failures to be discussed are basically too much production, too much consumption, too little choice for clients, too high costs for the quality provided and too little innovation. We shall investigate whether actual changes made in social security arrangements, and the arguments for them, can be fitted into the scheme of public sector failures or whether they have another origin.

5.1. OVERPRODUCTION

In the economic literature on public sector failures one can be sure to come across overproduction as a major problem Production is excessive if at the margin the value for its consumers is lower than the cost of providing the output. Net benefits of the redundant part of production are negative: valuable inputs are transformed into output of lower value.

The phenomenon of overproduction has been analyzed using different approaches. Underlying all of them is the view of the public sector as a centrally planned system, suffering from the same economic weaknesses that ultimately led to the collapse of the communist systems at the end of the 20th century. Applied to social security, one can point out that users of social security services do not directly pay for the service rendered. The finance comes from the government budget or from social insurance contributions. Consequently, which is essential from an economic point of view, consumer preferences are not revealed to the suppliers of the social service. The market's function of signalling the demand for the service is taken over by a national bureaucracy planning the quantity and quality of the service provided as part of the social arrangement. Since market signals are lacking, the planner needs a different clue with regard to how much to provide and of what quality. He has to gather and process relevant information on needs and costs and on the basis of this information he decides. But the capacity of the central organization has its limits. Imperfections in planning may lead to wrong choices. Mistakes alone can cause the planner to err on either side: quantity or quality can be either too much, or too little. However, other forces also have to play a role systematic overproduction.

Niskanen (1971) suggested the explanation that the bureaucratic administrator may not be the politician's neutral agent as portrayed by Weber, but has its own objective of maximizing the budget. If true, the bureaucracy tends to produce more public output than the efficient level. Since Niskanen's publication the focus of theoretical analyses has shifted to the role of interest groups lobbying for

higher budgets. The theory of rent-seeking analyses the strategies of interest groups trying to extract public expenditures or regulation that serves their special interests.[20] Political decision makers are an attractive target for rent-seekers, since they can provide goods or services for free while the costs will be borne by someone else. Successful rent-seeking feeds overproduction. In social security trade unions are major interest groups, although their pressure is mitigated by having to take into account the negative impacts that rising costs of social security might have on employment. Employers' organisations act rather as a countervailing power by demanding restraint from the politicians. In the past three decades trade unions and other interest groups have acted most manifestly in organizing resistance against government decisions to trim or reform arrangements in social security.

Bureaucrats and interest groups may push for more and better social security arrangements and resist cuts and restrictions, but in the end politicians decide. Ideologies and views on social security differ between parties, yet what is most striking is the broad political consensus in bringing about social security legislation. Over time it resulted in a development characterised by De Swaan (1989) as 'a long squib and late explosion'. The squib refers to the comparatively slow growth during the first half of the 20th century. The explosion came in the period from 1950 to 1980: social security expenditure expanded from hardly 6% of the national income to more than 28%, following the introduction of the type 2 social legislation.[21] The new social arrangements coming into force in the 1950s and 1960s were carried by a broad political consensus. In those economically booming years there was little attention for the economic cost of maintaining such an all compassing system of collectively provided security. Only in the 1970s, when the international economic tide turned did the full financial and economic consequences become visible and start to become a political worry. The public choice theories of bureaucracy and rent seeking are of little help to explain that turn. We rather think that the story of unforeseen consequences of decisions taken earlier applies here. Part of the explanation is the tendency to extrapolate present favourable developments into the nearby future. However, the 1970s were very different from the two foregoing decades. Once the new safety nets were in place, it turned out that not only did they function to support the victims of social accidents, but they were a potential invitation to make use of the available facilities. As a cause of the fast increase in the number of persons dependent on social security, it went hand in hand with the increase in unemployment due to the slowdown of economic growth and the subsequent deep depression from 1979 to 1983. The combination of social security expenditure going up (the nominator) and a stagnating national income (the

20 Tullock 1980.
21 Postma 1995.

denominator) led to a rapid rise in the relative costs of social security as well as a steadily increasing deficit in the government budget. The train of events took the political body by surprise. One additional explanation for the late and hard awakening is that social security financed by insurance contributions was not included in the government budget, but set apart in public social security funds, which were considered as a separate, closed system. Social contributions thus remained outside the norms drafted for the size of the government budget until 1976. In that year the so-called 1% norm was introduced, stipulating that the sum of taxes and social contributions as a percentage of national income should not grow faster than by 1% point per year.[22] The evident lack of political control of social security expenditure during the 1970's originated initially from a lack of political will, facilitated by the lack of unambiguous signals and norms for public social expenditure, and in the late 1970s the tide could not be turned due to a lack of suitable instruments.

5.2. OVERCONSUMPTION

From the point of view of the consumer, his use of social security is financed externally, through the public budget or through a social insurance scheme. Having past the eligibility test, the service has no costs, so that an incentive to contain consumption is lacking. For an unemployed person the unemployment benefit or income from poor relief is a subsidy on inactivity that tends to lengthen the period without a job. Wrong incentives for consumers tend to push the consumption of social security services to a level where at the margin the costs of provision exceed the benefits of those who consume it.

Where the service is provided for free, the introduction of a new social security arrangement creates a situation where supply literally generates its own demand. Consumers first have to discover the new product and when it suits them there is an incentive to pass the eligibility test. The strength of the 'supply generates its own demand' effect of new arrangements is difficult to predict, but easily underestimated. An outstanding example of this is the developments under the Invalidity Insurance Act. The level of benefit depended on the diagnosed degree of labour incapacity and in case of full labour incapacity benefits were 80% of the former salary and for people with minimum wage 100% of the former net wage. After the act came into force in 1967 a steadily increasing number of wage-dependent workers applied for and was granted benefits. In 2002 no less than 13.5% of the working population was receiving payments under the arrangement. By international standards an incredibly high level of full or partial labour incapacity.[23]

22 Postma 1995.
23 Calculation based on CBS data.

An almost similar story can be told about the Social Assistance Act, which came into force in 1965 to replace the Poor Law of 1912. Individuals from the age of 18 years without income of their own were eligible for income support, fixed at 70% of the net minimum wage. Income support was a right and no longer a favour, as it had been under the old law. Again the inflow was high and the number of people receiving support was increasing.

5.3. LACK OF CHOICE

As one can see in table 1, throughout the lifetime of a Dutch citizen an enormous amount of money is spent on social policy arrangements, principally social security services. For transfers only it amounts to roughly 6,000 euros per year (undiscounted value). From an economic perspective, this is money that cannot be spent freely according to a person's or household's own preferences, perceptions of risk and willingness to bear that risk. Instead the state decides on the destination of the tax payer's primary income and regulates for what and under which circumstances the tax payer is eligible for consumption of social services and what criteria will be applied to assess his or her eligibility. The regulations are very much of the type 'one size fits all'. The discrepancies between the diversity of private preferences, on the one hand, and on the other hand the uniform type of service and security provided by the arrangements imply a national welfare loss.

In social insurance the lack of choice shows up in the standards for eligibility, insurance coverage and level of benefits. Traditionally the client has no choice between insurers and between suppliers of the social services. There are signs that recent governments have understood the economic lesson that uniformity is a real bottleneck. Politicians have started to search for solutions that allow choice and consequently more diversity.

5.4. X-INEFFICIENCY

Public sector suppliers of social security traditionally have a monopoly in administrating and delivering the service. The relaxed existence of a monopolist, free from the pressure of competition, makes surveillance and containment of costs less urgent. Costs will tend to creep up to a level higher than necessary. The excess of costs above the necessary minimum has received the label X-inefficiency.[24] It can take many forms. The traditional jokes about the short working day and slow working pace of the civil servant reveal that a low work

[24] Leibenstein 1966; Leibenstein 1978.

load is a long-standing and widely observed form in which X-inefficiency has appeared. In social security, X-inefficiency can take the form of relaxing the criteria for being admitted as eligible for a specific arrangement, by applying the criteria less strictly than is formally required. It was considered to be one more cause, next to the overconsumption incentive, of the fast increase in the number of people receiving benefits under the Invalidity Insurance Act.

A recent study on internal and external care for the elderly, mainly provided by non-profit organizations gives a good illustration of X-inefficiency.[25] In 2008 costs per client of internal care could differ as much as (maximally) 25% between the most and least efficient provider. Examples of waste are unnecessary activities and overpriced purchases. A striking finding was that small establishments performed better than big ones.

A case, that has received much attention in the media, is the practice of non-profit firms supplying care-at-home to employ more highly qualified personnel than is strictly necessary – and charge for it. The practice was facilitated by the commissions that decided on eligibility and type of care, but they had no responsibility for the public budget spent on home care. Many journalists were enthralled about such good care for the needy old and sick, but from the economic point of view, it is a clear-cut piece of X-inefficiency.[26]

X-inefficiency can thrive were competition is lacking. Monopolists in the private for-profit sector are not free of it. However, the owners of stock that want to see profits are a countervailing power. Or the managers have to fear a take-over and shake out when their incapacity to show good profits is reflected in a low price of equity. In public (including non-profit) organisations such feed-back is lacking and consequently the scope for X-inefficiency is larger. Since financial (budget) surpluses cannot be paid out, the incumbents have an incentive to consume the potential surplus within the organisation under the guise of costs. From this perspective, X-inefficiency is more than simple neglect; it is a well-considered choice to use revenues for objectives other than the efficient delivery of services, including high salaries and wages, low workloads and expenditure on 'pet projects'.

For the Netherlands a striking illustration of pet projects is the merger wave between non-profit providers of home care in the first decade of the 21st century. A belief in the advantages of large scale in home care paired remarkably well with managers' ambitions and their perspective of a higher salary. In many cases the mergers resulted in big losses. A report on the bankruptcy of the Meavita

25 Gupta Strategists 2010.

26 See our chapter on instrumentalisation of the public interest for further discussion and references.

conglomerate concluded that the managers and supervisory board had been totally absorbed by the merger frenzy and had seriously neglected the firm's primary task of delivering home care services of good quality at a cost that is covered by revenue.[27] An example of a type of pet project that is well-known in the literature was provided by Newhouse (1970). Drawing his inspiration from health care, he pointed out that organisations with a strong position of professionals have a predilection for using the newest technology, which will show up in excess costs.

5.5. LACK OF INNOVATION

Innovation is the mainspring of economic progress. In social security, new ways of doing things can improve quality of service, raise the productivity of workers in the sector and lower costs. However, a large bureaucratic organisation that has a monopoly in its field is not a stimulating place for innovation. When life is easy the necessity to change is not felt. Moreover, most workers have no or hardly any space to diverge from the prescribed routines. When there is such space, the effort to innovate may fail, leaving the instigator with the blame; and if successful, what does he gain? A lack of incentives for innovation has the same background as X-inefficiency, but in the long run the resulting stagnation is far more serious. When there is innovation in a bureaucratic environment, it may even have adverse effects on cost and quality as the failures of realizing economies of scale through mergers in home care seem to suggest.

In this section the public interest in social security has been defined in terms of redressing the identified public sector failures. In the chapter on instruments we shall discuss the efforts to contain overproduction and overconsumption as well as the reforms to counter X-inefficiency, lack of choice for consumers and failure to innovate in social security.

6. CONCLUSION

The economist's view on the public interest in social security is defined as (a) identifying and correcting the market failures in the private provision of social security as well as (b) identifying and correcting the public sector failures in the public supply of social security. The major market failure is situated in the private organisation of solidarity among citizens in a society in which traditional patterns of support are crumbling. There are indications supporting the hypothesis that solidarity exists in the Netherlands and that the vertical

27 Keijser 2009.

redistribution of income through the social security system is voluntarily accepted. The types of social security that redistribute vertically are the age-old forms of poor relief provided by local governments, which were more and more nationally regulated and financed out of national taxes during the 20th century. Next to that new types of social insurance covering the whole population were introduced after the Second World War. Insurance to guarantee a minimum level of income in old age, insurance to cover exceptionally high medical costs and insurance covering the personal expenditures on health care have been designed in such a way that the contributions paid by citizens in the higher income brackets co-finance the benefits of citizens with lower incomes.

In contrast, many existing types of social insurance that have been introduced during the 20th century for wage-dependent workers do not redistribute income vertically. Basically their feature is mandatory insurance, supported politically by organized labour. The argument that they serve to correct failures in the insurance markets is not convincing. Government intervention that does not correct market failure is not in the public interest. Economic theory thus provides no arguments why the government should be involved here.

In building up social security as a public sector activity, political decision makers had a broader conception of the public interest in social security than the more narrow definition of welfare economics allows. Clearly, more political objectives were involved than raising national welfare through a correction of market failures in coordinating solidarity among citizens. Mixed as the motives may have been, the fact is that in the 20th century social security has developed as a public sector provision. Whatever the reason for the existence of different categories of social security, it is in the public interest that public sector failures in its provision are prevented and, if detected, that they are remedied. The build-up and completion of the welfare state in the 1950s and 1960s led to an unforeseen increase in the cost of social security when the international economic tide turned. The ongoing growth of unemployment in the 1970s and early 1980s convinced the government that social security had over-expanded to an economically unsustainable level. The decades that followed were clearly characterized by an ongoing struggle against the public sector failures of overproduction and overconsumption. It went hand in hand with the detection of other public sector failures: lack of choice for clients, too high costs for the quality provided (X-inefficiency), and too little innovation. Efforts have been undertaken to mend them. In doing so, political decision makers have indeed conceived the public interest in the way economic science suggests. And in their actions they have also followed the prescriptions derived from economic theory more closely than they did in the foregoing decades of building up the national system of social security.

THE PUBLIC INTERESTS OF SOCIAL SECURITY: A SOCIAL SCIENCE PERSPECTIVE

Mirjam Plantinga

1. INTRODUCTION

The concept of public interests has received more and more attention lately. In the policy domain in particular public interests are a major point of concern.[1] Often government policies are justified by arguing that they are in the public interest. Significant factors explaining the current attention to the concept of public interest are the reforms the Western welfare states have been confronted with over the past decades. Important elements of the reforms are the introduction of market forces and a re-orientation of the role of the government. Where the responsibility for the welfare state used to be solely attributed to the public domain, in the reforms the advantages of the market, especially with regard to the possibilities of increasing efficiency, are brought to the fore. Shifting responsibilities from the public to the private domain does, however, requires a definition of public interests in a more private welfare state. What should be considered as the inviolable part of the welfare state? Can public interests be safeguarded in the private domain or does the safeguarding of the public interest require government intervention? In order to be able to solve the issue of the safeguarding of public interests, first, the question for which public interests the government should take responsibility needs answering.[2] It is this question that is the object of this chapter. In defining public interests a social science approach will be used.

1 Dicke & De Bruijn 2003; Bozeman 2007.
2 WRR 2000.

2. STATE OF THE ART

2.1. FROM PUBLIC INTERESTS TO PUBLIC VALUES

In this chapter the public administration or more broadly the social science approach to defining public interests is used. The reason for not restricting the approach to the public administration literature is that the public administration discipline traditionally has been a multidisciplinary field based on theories and concepts from a range of related disciplines. Moreover, the approach towards defining public interests taken by public administration scholars and researchers stemming from related disciplines such as political science and sociology show great similarities. It is important to mention that the social science approach as presented here does not include the economic discipline. In fact, the social science approach to defining public interests is positioned opposite to the economic or New Public Management approach.[3]

The social science approach as used in this chapter focuses on the *perception* of citizens, being the clients of what the state can provide. From the perspective of social science public interests have to do with support: public interests are only public interests if citizens recognize them as public interests. This also implies that an attempt of the state to safeguard these interests will gain support of these citizens. An important proponent of the social science approach to defining public interests is Bozeman (2002; 2007; 2008). According to Bozeman (2007, p. 12) 'public interest refers to the outcomes best serving the long-run survival and well-being of a social collective construed as a "public".' The definition of Bozeman resembles the view of the Netherlands Scientific Council for Government Policy (WRR). In their report 'Het borgen van publiek belang' (safeguarding public interests), the WRR (2000) defines public interests as those interests that have been labelled as such in a normative debate in a country and which results have been inscribed in law by the legislator. Important aspect of the definition of the WRR is, however, that the concept of public interest implies government intervention, while in the line of reasoning of Bozeman the concept of public interest does not necessarily imply government intervention. Bozeman (2007) argues that public interests may be realized in the private domain and that only in situations when public interests are not realized without government intervention, is the government required to take action. Whether or not governments should intervene therefore depends on the extent to which public interests are being realized. Since the definition of public interests, as brought forward by Bozeman, resembles the general view on defining public interests in social sciences, this definition of public interests will be used in this chapter.

[3] Bozeman 2007; Stoker 2006; O'Flynn 2007.

The social science approach to defining public interests, raises the question whether a unifying definition of public interests exist. The answer is that it does not. A unifying definition of public interests does not exist since public interests depend on what societies agree on at a certain point in time and 'certain 18th-century self-evident truths might be subject to very different interpretations today'.[4] Public interests are therefore 'ubiquitous',[5] 'emergent',[6] and 'ambiguous'.[7]

If the social sciences cannot come up with a line of reasoning that leads to determining what public interests are, the question arises whether the social science approach can provide guidance to decisions about the allocation of responsibilities between public and private actors. Given the ambiguity of the definition of public interests, public interest theories provide little or no guidance in this respect. In the social sciences, over the years, the literature has therefore started to focus more and more on public values.[8] The distinction between public interests and public values is that the former is regarded as an elusive ideal, whereas public values have specific identifiable content.[9]

2.2. IDENTIFYING PUBLIC VALUES

The public value approach was first articulated by Moore (1995). According to Moore (1995, p. 28): 'The idea of managerial work in the public sector is to create *public* value just as the aim of managerial work in the private sector is to create *private* value.' An important aspect of public values is, however, that they are expressed by the citizenry and determinations of the citizenry inherently are collective choices.[10] Public value can therefore not be derived from the aggregation of individual preferences such as done in the economic approach, but only from individual and public preferences resulting from public deliberation.[11] Public values thus rely on 'politically-mediated expression of collectively determined preferences'.[12]

Given the link between public interests and public values, in the social sciences the concepts are often used interchangeably.[13] According to Bozeman (2007, p. 13)

4 Jørgensen & Bozeman 2002, p. 375.
5 Bozeman 2007, p. 143.
6 Stout 2007.
7 Dicke & De Bruijn 2003.
8 Bozeman 2002.
9 Bozeman 2007.
10 Alford 2002.
11 Kelly, Mulgan & Muers 2002.
12 O'Flynn 2007, p. 360.
13 Dicke & De Bruijn 2003.

> A society's 'public values' are those providing normative consensus about a) the rights, benefits, and prerogatives to which citizens should (and should not) be entitled); b) the obligations of citizens to society, the state, and one another; and c) the principles on which governments and policies should be based.

Moreover, public values can be traced in many ways. Public values are, for example, reflected in fundamental laws and constitutions. Public values often are also reflected in policy and politics, public speeches, elections, and public policy. Furthermore, in countries with a strong judiciary, the high courts are regarded as an excellent viewing point for identifying public values.[14] Without defining what public values actually are, Bozeman therefore does define a set of core public values for which the government is responsible. Other authors follow the same line. De Bruijn & Dicke (2003), for example, distinguish between procedural and substantive values. Procedural public values refer to the way the public sector should act and to standards that the process of government action should meet, while substantive values are defined as those 'values for which the state, either directly or indirectly, is responsible'. The content of such core or substantive values is, however, not specified and may differ from sector to sector, from country to country and even over time.[15]

Lately, in the social science literature, analyses of public values are conducted for many different countries and different sectors. As a result, different lists of public values have been proposed.[16] Jørgensen & Bozeman (2002) have, for example, examined leading public administration periodicals on writing on public values.[17] On the basis of their analysis they come up with a list of 72 public values including, amongst others, social cohesion, legality, equity, and accountability. In the Netherlands, public values in utility sectors are intensively studied. In these sectors, public values such as affordability, safety, and the protection of the environment are important.[18] In an analysis of the reorganizations in the Dutch social insurance schemes, public values such as social cohesion, effectiveness, and accountability are brought to the foreground.[19] The public values that most often come up are: quality, accessibility, and efficiency.

The different lists of public values show that in each context different values are emphasized. An important aspect that the lists of public values bring forward is therefore that public values are a social construct. A weak aspect of the social science approach to identifying public values is, however, that it provides little guidance in making decisions regarding the allocation of responsibilities

14 Bozeman 2007.
15 Jørgensen 2007.
16 Schreurs 2003.
17 Bozeman 2007.
18 De Bruijn & Dicke 2006; Stout 2007; Lijesen Kolkman & Halbesma2007.
19 Van Gestel 2003.

between government and private parties. To some extent the identification of a different set or a change in public values may be helpful in deciding about which institutional setting is best suited for safeguarding these values, for different public values may ask for different safeguards. The analysis of Van Gestel (2003), for example, shows that a changing attitude towards the position of the social partners in the Dutch welfare state, has resulted in a handing over of responsibility for the safeguarding of public interests from the social partners as a collective to individual employers and employees. Also in the history of the Dutch welfare state, changes in the organization of the welfare state can be explained by a reorientation of public values.[20] Given the interaction between public values and the context in which they operate it is, however, questionable whether an adequate measure of normative consensus about public values can be obtained. Moreover, such an analysis does not provide the government with a decision making tool with regard to the allocation of responsibilities.

2.3. IDENTIFYING PUBLIC VALUES FAILURES

In order to be able to make decisions about the allocation of responsibilities between public and private, Bozeman (2007) proposes a pragmatic approach to public interest theory. In this view it suffices to pay attention to public values in decisions about the allocation of responsibilities. More specifically, one should focus on instances where public values fail. The public values failure approach is positioned opposite the economic approach. Where the economic approach starts with an ideal of a perfect market, and applies this ideal to concrete policy issues, the public value failure approach begins with the policy issue 'and then works toward a limited ideal – a practical solution to a recognized public failure'.[21] According to Bozeman, in decisions about the allocation of responsibilities between public and private actors, public value failure instead of market failure should be leading. This raises the question how to define instances where public values fail.

According to Bozeman (2007, p. 16) 'from one perspective it is not possible for public values to fail; they simply change. But if we consider a public value about which there is consensus and observe that the value is not being obtained, then perhaps it can be said to have failed.' In line with market failure criteria, Bozeman poses eight criteria for identifying public value failures. Public values failures are likely to occur in the case of extended time horizons, cases of imperfect public information and in situations that threaten human dignity and subsistence. The criteria suggested are not meant to be exhaustive, but are debatable and are

20 Plantinga & Tollenaar 2007.
21 Bozeman 2007, p. 100.

meant to promote deliberation about public value. By focusing on public values failure criteria, one is expected to receive a better understanding of the relationship between public values and the system in which they operate, especially with regard to the type of contexts in which public values are likely to be pressured. Moreover, in instances where public values are not provided it is up to the government to take action.

Although questions regarding the allocation of responsibilities can be considered as an issue of safeguarding and therefore beyond the scope of defining or identifying public interests, the importance of defining public interests is given by the link between defining public interests and safeguarding them. In fact, if it is not possible to define the public interests for which the government should take responsibility, it is also not possible to analyze to what extent the government fails or succeeds in doing so. If the social science approach wants to operate on an even playing field with the economic approach to defining public interests, that is influencing decisions regarding the allocation of responsibilities between public and private, developing analytical tools for guiding such decisions can be argued for. The public value failure criteria Bozeman (2007) proposes forms a first step in such a direction and can therefore be regarded as an important development in the social science approach to defining public interests.

3. APPLYING THE SOCIAL SCIENCE APPROACH TO THE WELFARE STATE

3.1. IDENTIFYING PUBLIC VALUES IN WELFARE STATES

Without defining what public values actually are, by using the concept of public value failure as an argument for government intervention, Bozeman (2007) does imply that there is a set of core public values for which the government is responsible. The content of such a set of core or substantive public values is, however, not specified since it may differ from sector to sector, from country to country and even over time. Research, for example, shows that changing economic conditions go hand in hand with changes in public attitudes towards welfare state policies.[22] The question therefore remains what presently should be considered as the inviolable part of Western welfare states. A social science approach to answering this question demands an analysis of the public values that are held within a given country, regarding a certain policy context, during a certain period of time.

22 Blekesaune 2007.

In the history of the Dutch welfare state, public values are, for example, the redistribution of income through the provision of a minimum level of subsistence as well as the protection of income, legitimacy, solidarity, equality of rights, legal certainty, and the efficiency and effectiveness of the institutional design of the welfare state.[23] Goodin et al. (1999) come up with a slightly different list. According to them there is a broad consensus across all welfare regimes that welfare goals should include the following: promoting economic efficiency, reducing poverty, promoting social equality, promoting social integration and avoiding social exclusion, promoting social stability, and promoting autonomy. Social objectives of the European Union, linked to the concept of fundamental rights, for example, are freedoms such as the right to liberty and security, equality, solidarity, citizens' rights, and justice.[24] And according to Esping-Andersen (1990), the essence of social policy can be captured in one policy goal: the extension of social rights, where social rights can be regarded in terms of their capacity for decommodification.

The different lists of public values show that in each context different values are emphasized, although the lists are characterized by some overlap. As mentioned, the fact that something is perceived as a public value provides, however, little guidance in making decisions regarding the allocation of responsibilities between government and private parties. According to the social science literature, the responsibility for the government comes up only in instances where public values fail. In order to be able to make decisions about the allocation of responsibilities between public and private it is, therefore, important to focus on identifying public values failures in Western welfare states.

3.2. IDENTIFYING PUBLIC VALUES FAILURES IN WELFARE STATES

One way of identifying public values failures in welfare states is by investigating to what extent welfare states are publicly supported or democratically legitimized. As mentioned, a public values failure occurs when the public values about which there is consensus are not being obtained. A low level of public support for a welfare regime that does not safeguard the public values about which there is normative consensus, therefore forms an indication of a public values failure. As table 1 shows low public support may, however, also be explained by a low importance that is attached to the specific welfare state regime. In this case, a low level of public support does not indicate a public values failure but rather forms an indication that something is *not* considered as a public value. In order

23 Plantinga & Tollenaar 2007.
24 D'Antonio 2006.

to be able to identify public values failures in welfare states it is therefore important not to focus on low levels of welfare support alone, but also investigate how low levels of public support can be explained.

Table 1. Identifying public values failures in welfare states

Importance attached to welfare state regime	Public support for welfare regime	
	Low	High
Low	No public value	No public value
High	Public value failure	Public value realization

In sociological explanations for the legitimacy or public support of welfare states, solidarity is often brought forward as an important explanatory factor. Recently, however, solidarity is said to be under pressure due to processes of individualization and globalization.[25] According to Van Oorschot (2000), the question whether solidarity is under pressure depends heavily on the way the concept is operationalized. Van Oorschot argues that solidarity consists of several elements: solidarity out of perceived self-interest, solidarity out of moral conviction, and solidarity because of emotional ties. In the Netherlands, perceived self-interest is found to be the most important motivator for willingness to contribute to the welfare state. Of the Dutch population 82% regards perceived self-interest as an important motivator for contributing to welfare, 64% is motivated to pay for reasons of moral convictions, and 42% because they have compassion for the beneficiaries. Van Oorschot argues that when the concept of perceived self-interest is taken into account, developments of processes of individualization are not found to be threatening for solidarity.[26] In fact, according to him, in order to receive high public support the key is to make large parts of the population stakeholder of the welfare state. Crepaz (2008), however, argues that due to rising diversity as a result of increased immigration, solidarity out of perceived self-interest is not sufficient and attitudes of universal trust and a sense of social solidarity are of high importance for the willingness to support the welfare state.

Although there is disagreement with regard to the question which type of solidarity is most important when explaining the public support for the welfare state, the importance of solidarity for the legitimacy of the welfare states is clear. The importance of different types of solidarity is also shown in the extent to which benefits for different needy groups are publicly supported. Van Oorschot (2006a) has investigated European public perceptions with regard to the relative

25 De Beer & Koster 2007.
26 Van Oorschot 2006b.

deservingness of several needy groups. Over the past decades in Western welfare states, the public was found to be most in favour of social protection for old people, closely followed by sick and disabled people. Unemployed people were found to be a little less deserving and social assistance receives least support of all. Howard also finds that the rank order of priorities between different needy groups is similar across different nations, including the United States.[27] According to Van Oorschot (2006b, p. 25) the distinction in support for the various groups of needy people can therefore be regarded as a 'truly universal element in the popular welfare culture of present Western welfare states'.

Van Oorschot (1998) explains the distinction in support for the various groups of needy people by five deservingness criteria: control, need, identity, attitude, and reciprocity. Control refers to the control people have over their neediness. The less control, the more deserving people are found to be. Need refers to the level of need: the higher the level of need, the more deserving. Further, people who we can easily identify with and people with an attitude of gratefulness and willingness to conform to our standards are found to be more deserving. Finally, people who have contributed to our group before or who can be expected to contribute in the future are found to be more deserving. Empirical research based on a Dutch solidarity study stemming from the year 1995 shows that the most important deservingness criteria are control, identity, and reciprocity. Control has also found to be an important criterion in other European and American studies.[28]

To conclude, the sociological literature shows that support for the welfare state is influenced by the deservingness criteria control, need, identity, attitude, and reciprocity. Also different forms of solidarity such as solidarity out of perceived self-interest, solidarity out of moral conviction, and solidarity because of emotional ties, are important. In the next section, we will investigate the public support Western welfare states receive and describe to what extent differences in welfare state support can be explained by deservingness criteria and different forms of solidarity. In doing this, we hope to identify, in the case when low levels of public support are found, whether these low levels of support form an indication of public values failure.

27 Howard 2007.
28 Van Oorschot 1998.

4. IDENTIFYING PUBLIC VALUES FAILURES IN WESTERN WELFARE STATES

4.1. WESTERN WELFARE STATES

Before addressing the public support for Western welfare states, it is important to pay attention to the concept welfare state. Since each country has its own welfare state with its own unique culture and institutional set-up, one cannot speak of 'the' welfare state. However, it is also not the case that the welfare states are totally different from each other. Most Western welfare states share similar characteristics. In the literature, three types of welfare states or welfare regimes are distinguished: the liberal, corporatist/conservative, and social democratic regime.[29] An overview of the differences between the three regime types is given in table 2.

Table 2. Overview of differences between the liberal, corporatist/conservative, and social democratic welfare regime

Welfare regime	Liberal	Conservative	Social democratic
Underlying principle	Need	Reciprocity (equity)	Universalism (equality)
General aim of regime	Minimum level of subsistence	Income protection	Promotion general well-being
Safeguarding instrument	Social assistance	Social insurance	Universal benefits
Responsibility	State responsibility	Involvement of social partners	State responsibility

Source: Clasen & Van Oorschot 2002, p. 94.

Each regime type is characterized by different underlying fundamental values or principles.[30] Liberty forms an important value in the liberal welfare state. In relations of free exchange, people are able to make mutually beneficial exchanges. Only when the market fails in the sense that some people are in danger of falling below a designated poverty line, is the government required to step in. On the basis of the principle of need resources are redistributed to only those who are worst off. The reduction of poverty as the provision of a minimum level of subsistence therefore is an important goal of the liberal welfare state. Social assistance forms an important instrument for attaining these goals and the provision of social assistance is considered a state responsibility.[31]

29 Esping-Andersen 1990.
30 Goodin et al. 1999; Clasen & Van Oorschot 2002.
31 Clasen & Van Oorschot 2002.

In a conservative or sometimes also called 'corporatist welfare state' social cohesion is an important underlying value. In such a regime, cooperation and collaboration are important. People contribute to the group they belong to and, in case of problems, can fall back on this group. The principles of reciprocity and equity are also important: the entitlements depend on the contributions that have been made. Important goal of the conservative or corporate regime is therefore income protection, and in doing this, preserving the social order and realize social stability.[32] Social insurance schemes are an important instrument for realizing these goals. Furthermore, both organized employers and organized trade unions play an important role in the provision of these insurance schemes.

Finally, in a social democratic welfare state social equality as well as freedom, justice and solidarity are important underlying values.[33] Vital is also the principle of universalism: everyone should be able to participate in society. The promotion of general well-being therefore is an important aim of the social democratic welfare state, but also goals such as reducing poverty, enhancing economic equality and personal autonomy are important for realizing social equality. Redistribution of resources from the rich to the poor forms an important safeguarding instrument in a social democratic welfare state as well as the provision of universal benefits.

Although the welfare regime classification of Esping-Andersen is criticized the distinction between three different ideal types is used up until today since it provides a useful heuristic for identifying broad differences in welfare regimes.[34] Moreover, what is important for our discussion is that the three welfare regimes are expected to differ with regard to the public support that is given to their welfare policies.[35]

4.2. PUBLIC SUPPORT FOR WESTERN WELFARE STATES

According to Esping-Andersen (1990) social democratic welfare states have the highest capacity for decommodification, that is, the extent to which individuals can uphold a socially acceptable standard of living independent from their participation on the market. The capacity for decommodification is lower in conservative welfare states, while liberal welfare states have the least capacity for decommodification. According to this typology, in social democratic welfare regimes the highest public support for government intervention can be expected,

32 Goodin et al. 1999.
33 Stjernø 2008.
34 Esping-Andersen 1990; Svallfors 1997; Lapinski et al.1998.
35 Lapinski et al.1998.

followed by conservative welfare regimes. Finally, liberal welfare regimes are expected to be characterized by the lowest public support for government intervention.[36] The evidence regarding these hypotheses is, however, partly contradicting and partly supporting.

Gelissen (2000), for example, does not find support for the hypothesis that a relationship exists between welfare regimes and levels of support. His analysis is based on the Eurobarometer 1992 and 2001 surveys and includes the public support for a broad range of government interventions, such as, government intervention aimed at ensuring a decent standard of living for children and the unemployed and housing support. Individuals who live in social democratic welfare regimes show less support for these types of government intervention compared to individuals living in liberal welfare regimes. When using the 1989 Eurobarometer survey and investigating the question 'which social welfare programs are absolutely necessary to be able to benefit from social welfare when needed', Lapinski et al. (1998) also find that social democratic welfare states did not attract greater support.

Variations between welfare state regimes are found when the International Social Survey Program (ISSP) data for 1985 and 1990 are used. Lapinski et al. (1998) find a difference in attitude between, on the one hand, liberal countries, and on the other hand, conservative and social democratic countries. Individuals living in liberal welfare regimes are less supportive. No differences between conservative and social democratic countries are observed. Andreß & Heien (2001) use the ISSP data of 1992. They also find that people in liberal welfare states show low levels of support for governmental action. They further find medium level of support in conservative regime and high support in social democratic regime. The questions they use are: whether it is the responsibility of the government to reduce income differences, whether it is the responsibility of the government to provide jobs for all, and whether it is the responsibility of the government to provide a basic income for all. The measure of public support in the ISSP data is therefore different from the measure of the Eurobarometer surveys.

According to Larsen (2008), when focusing on items measuring attitudes towards policies concerning the poor and the unemployed, a regime pattern can be found. Liberal welfare regimes receive low support, conservative regimes moderate support, and social democratic regimes high support. Svallfors (1997) comes up with similar conclusions. Based also on the ISSP data of 1992, he concludes that the social democratic welfare regime shows the highest redistribute attitude and highest support for government intervention, while the redistribute attitude and support for government intervention are lowest in the liberal welfare regime. The

36 Lapinski et al.1998.

analyses of the public support for Western welfare states thus show that welfare states show large similarities in public support for a broad measure of government intervention. Public support does, however, differ for policies concerning the poor and the unemployed. In the next section possible explanations for these differences in public support are brought forward.

4.3. EXPLAINING DIFFERENCES IN PUBLIC SUPPORT

In explaining why social democratic welfare regimes are characterized by the highest public support and liberal welfare regimes by the lowest public support with regard to policies concerning the poor and the unemployed, Svallfors (1997) focuses on differences in attitudes to income differences. He finds that citizens from different welfare regimes vary in the extent to which income differences are regarded as legitimate. Compared to citizens living in the liberal welfare regime of the United States, citizens of social democratic welfare regimes, in particular Norwegians, are much less in favour of income differences. From this respect, differences in public support for income redistribution by the government can be explained by different attitudes with regard to the legitimacy of income differences.

Alesina & Angeletos (2003) explain differences in public support by differences in perceptions regarding the fairness of market outcomes. They argue, that when income differences are believed to be highly determined by luck higher income redistribution is supported compared to situations where income differences are believed to be highly determined by one's own effort. Lower public support for income redistribution in the United States can, from this respect, be explained by a strong belief that income differences are highly determined by one's own effort and not by luck. The World Values Survey, for example, shows that 71% of the Americans versus 40% of the Europeans believe that the poor could become rich if they tried hard enough. According to Alesina & Angeletos (2003), this argument is not limited to a comparison of the United States versus Europe, but holds for European welfare regimes as well. They find a significant relationship between a leftist political orientation in a country and the belief that luck determines income.

The follow-up question is how differences in attitudes toward the legitimacy of income differences can be explained. Comparing the United States with European welfare regimes, Alesina & Glaeser (2004) find that economic explanations in terms of a lower pre-tax income inequality and lower income mobility give little explanation of why citizens from social democratic welfare regimes favour income differences less. They find that the political institutions and heterogeneity of the population in the United States do form an important

explanation. Brooks & Manza (2007) also find that the context in which individuals are situated forms an important explanatory factor for welfare state preferences.

Larsen (2008, p. 148) offers an explanation of how differences in institutional structures may influence welfare state preferences. He argues that 'the institutional structure of the different welfare regimes influences or frames the way the public perceives the poor and unemployed'. His analysis is based on the deservingness criteria we discussed in section 3.2: control, need, identity, attitude, and reciprocity. According to Larsen a liberal welfare regime, characterized by a selective welfare policy, opens the discussion of whether people are in need, in control, and have a grateful attitude. Moreover, it creates boundaries between 'them' and 'us' negatively affecting the willingness to support the welfare state for reasons of identity and reciprocity. The logic of a social democratic regime, characterized by a universal welfare policy, is in many respects contrary to the liberal regime. In a social democratic regime, the discussion of whether people are in need, are to blame for their need, or are grateful for the welfare resources they receive, is far less important. This increases the willingness to support the welfare state for reasons of meeting the deservingness criteria need, control, and attitude. Moreover, in a universal welfare state regime everyone belongs to a national 'us' and the boundaries between those who give and those who receive are blurred, positively affecting the willingness to support the welfare state for reasons of identity and reciprocity.

The hypothesized link between welfare regimes and the fulfilment of deservingness criteria is verified in an analysis of the World Values Study of 1990. Larsen (2008), for example, finds that in the liberal welfare regime of the United States 39% of the people belief that the reason for people living in need is due to laziness and lack of willpower, while in the social democratic regime of Sweden only 16% of the people belief so. In addition to the deservingness criteria, Van Oorschot (2000) has emphasized the importance of solidarity for welfare state support. According to Van Oorschot (2006b), the support for solidary welfare policies highly depends on the interest that the middle class has in the regime. He argues that in order to retain high public support it is important to make a large part of the population stakeholder of the welfare regime. The involvement of the social partners is therefore important. Moreover, it might form an important explanation for the finding that social democratic welfare regimes are characterized by higher levels of public support.

All in all, the research described in this section shows that an important factor explaining differences in public support between welfare states, is the extent to which different groups are perceived as being deserving or meet the deservingness

criteria. From this respect, a low level of public support for policies concerning the poor and the unemployed found in liberal welfare regimes does not seem to be an indication of a public values failure. Rather, it indicates that citizens of liberal welfare states perceive the position of the unemployed and the poor differently compared to citizens of social democratic welfare states.

5. TOWARDS AN INTERDISCIPLINARY APPROACH TO DEFINING PUBLIC INTERESTS

In the social science approach to defining public interests, public values play an important role. The distinction between public interests and public values is that the former is regarded as an elusive ideal, whereas public values have specific identifiable content. An important message the social science literature brings forward is that public values are a social construct. When focusing on the question what can be regarded as the public values of the welfare state, a social science approach will emphasize that the answer essentially is an empirical one: public values are values that are supported by the public at large. What constitutes the prevailing public values therefore varies from one country to the next and is susceptible to change over time. From the perspective of social science, an interdisciplinary approach should therefore take the context into consideration when trying to define public interests.

The fact that something is regarded to be in the public interest or is perceived as a public value does not, in itself, have any implications for decisions with regard to the allocation of responsibilities between public and private. According to an important stream in the social science literature, the responsibility for the government comes up only in instances where public interests are not realized or public values fail. The question is then, of course, in which instances public values fail. Important development in the social sciences is the public values failure approach of Bozeman (2007) which formulates general criteria, in line with market failure criteria, to describe situations in which public values are more likely to fail. A second important element the social science approach to defining public interests brings forward is therefore that in order to be able to make decisions about the allocation of responsibilities between public and private, it is necessary to focus on public values failure.

One way of identifying public values failures in welfare states is by analyzing to what extent welfare states are publicly supported or democratically legitimized. A low level of public support for a welfare regime that does not safeguard the public values about which there is normative consensus, forms an indication of a public values failure. A low public support may, however, also be explained by a

low importance that is attached to the specific welfare state regime. In this case, a low level of public support does not indicate a public values failure but rather forms an indication that something is not considered as a public value.

What is clear from the welfare state literature is that the rank order of public support for different needy groups is similar across different welfare regimes. All over modern Western welfare states, in various decades, the public was found to be most in favour of social protection for 1) old people, 2) sick and disabled people, 3) needy families with children, 4) unemployed people, and 5) people depending on social assistance.[37] The hierarchy in public support between the different groups can be explained by five deservingness criteria: control, need, identity, attitude, and reciprocity.[38] Given the stability in rank order of public support for different needy groups, the low level of public support that is attached to government interventions for the unemployed and for people depending on social assistance does not seem to be an indication of public values failure but rather indicates a difference in importance that is attached to the protection of these groups (see table 3). That is, the unemployed and people depending on social assistance are perceived as less deserving in comparison to the old, sick, and disabled.

Table 3. Identifying public values failures for policies concerning different needy groups

Importance attached to different needy groups	Public support for policies concerning different groups	
	Low	**High**
Low	No public value (Poor and unemployed)	No public value
High	Public value failure	Public value realization (Old, sick and disabled)

The literature further shows that the level of public support for policies concerning the poor and the unemployed in liberal welfare regimes is lower than the public support in social democratic welfare regimes. Also here the question arises whether the low levels of public support found in liberal welfare regimes can be explained by differences in public values, or whether these low levels of support form an indication of a public values failure. Here, the explanations also seem to be more in line with the former. Research shows that the extent to which different groups are perceived as being deserving or meet the deservingness criteria, differs between welfare regimes. A low level of public support for policies concerning the poor and the unemployed in liberal welfare states therefore does not necessary indicate a public values failure. Rather it indicates, as table 4 shows,

37 Van Oorschot 2006a.
38 Van Oorschot 1998.

that citizens of liberal welfare states perceive the position of the unemployed and the poor differently compared to citizens of social democratic welfare states. The way the position of specific groups, such as the poor and the unemployed, are perceived is thus context dependent.

Table 4. Identifying public values failures for different welfare regimes

Importance attached to the poor and unemployed	Public support for policies concerning the poor and unemployed	
	Low	**High**
Low	No public value (Liberal welfare regime)	No public value
High	Public value failure	Public value realization (Social democratic regime)

Although within each context or welfare regime, the extent to which certain groups are perceived as deserving changes over time and is adjusted to economic developments such as levels of unemployment, changes in perceptions between welfare regimes are likely to persist since they originate from institutional factors and are historically grounded.

But what if the context changes? According to Van Oorschot, Opielka & Pfau-Effinger (2008, p. 1) 'a political culture of neo-liberalism has been steering the restructuring of the Western welfare states during the last two decennia'. This trend entails an increase in forms of privatization and more stringent criteria for access to social services often including individual work obligations. In other words, social democratic welfare regimes have become more liberal. Clasen & Van Oorschot (2002) also argue that over the years in European welfare states the need principle has increased in importance.

The question is to what extent the developments in Western welfare states are in accordance with the public values held by the general public. A change in welfare regime, such as a decrease in access to social services, can be the result of a shift in public values. Certain groups of welfare clients may, for example, be no longer perceived as deserving by the public at large. As a result, the importance that is attached to social protection for these groups is low, indicating that it is not regarded as a public value. In this case, the change in welfare regime is in accordance with the public values held by the general public. However, when public values have remained unchanged, a change in welfare regime might not be in accordance with the public values held by the general public. In fact, when due to a change in welfare regime public values about which there was normative consensus are no longer being obtained, a public values failure occurs.

Given that public values are a social construct it is not likely that a change in welfare regime leaves the prevailing public values untouched. A decrease in entitlements for certain welfare clients may, for example, have a decreasing effect on the importance that is attached to the social protection of these groups.

General explanations regarding the causality between public values and welfare state regimes cannot be given based on the data described in this chapter. On the one hand, the social science literature argues that the public values held in society should be reflected in welfare policies. Welfare regimes should therefore be the product of the public values held in a certain society. On the other hand, it is argued that institutional elements of the welfare state influence public values and therewith public support for the policy at hand. Public values are thus influenced or produced by the welfare system. This chapter shows that with regard to the finding that societies are willing to give financial aid to groups of people regarded as deserving, the former explanation seems to hold, while with regard to the perception of who is regarded as deserving, the latter explanation seems to be leading.

To conclude, our analysis of the public support for Western welfare states shows that some general notions can be made with regard to what should be considered as the inviolable part of the welfare state. A public interest to protect vulnerable groups can be identified. Which groups are believed to deserve protection or which level of protection is believed to be necessary does, however, depend on the institutional context. As a result, the allocation of responsibilities between public and private for the protection of these groups depends on the institutional context and may therefore differ from country to country and over time.

THE PUBLIC INTEREST AND THE WELFARE STATE: A LEGAL APPROACH

Gijsbert Vonk and George Katrougalos

1. INTRODUCTION

This contribution examines public interest and the welfare state from a *legal* angle. It addresses the following question: does the law provide a basis for defining social security as a public interest and if so, to what extent is this interest supported by concrete legal standards?

This chapter is structured as follows. Paragraph 2 includes some preliminary observations with regard to the public interest as a legal concept. While this concept is frequently used in the law, it does not have a fixed meaning. The concept is a typical example of an open norm, the meaning of which varies according to the legal regime, the specific context of the case and the nature of government policies. For this reason it was decided not to use a 'public interest doctrine' as a tool for answering our question. Instead we have identified the public interest with *state responsibility* in relation to fundamental socio-economic rights. Legal doctrine with regard to these rights provides a framework for interpreting the state responsibility.

Before proceeding with this analysis, in paragraph 3 we explain how these rights developed within a historical context in order to demonstrate the social rationale behind their implementation and the process of their constitutional recognition as fundamental rights. Paragraph 4 refers to the modern method of differentiating the state obligations, i.e. the obligation to respect, the obligation to promote and the obligation to fulfil.

In paragraph 5 we move on to the second part of the central research question, dealing with concrete legal standards. Here the quest is to link the framework of state-obligations to the principles underlying the right to social security. It was tempting to deduce these principles from various legal sources. But it is difficult to do so without resorting to subjective arguments and 'cherry picking' the legal rules in support of these arguments. As a result, we decided to propose our own

basic principles, which we then examined in order to find out to what extent they are actually supported by concrete legal standards. The concrete legal standards have been drawn from various sources, i.e. both international and regional instruments (such as conventions of the ILO and the Council of Europe), domestic legislation, case law and doctrine. The article concludes in paragraph 6 with a number of reflective remarks about our legal approach to defining social security as a public interest.

2. THE PUBLIC INTEREST AS A LEGAL CONCEPT

The term 'public interests' and its equivalents 'general interests' and 'public good' play a major role in legal argumentation. The concept seems to be particularly relevant in case law when courts feel a need to create room for exceptions to established legal rules. Thus, for example, legal doctrine dictates that indirect discrimination is prohibited unless it is objectively justified by the public interests. Likewise, in European Union law, the public interest test is a means of allowing exceptions to the free market regulation. Under this test, trade restrictions may be excusable when they are 'aimed at an overriding reason of public interest'. Similarly some fundamental freedom rights for citizens may be restricted in the light of the public interest.

When we look at these examples the concept of the public interest each time refers to some collective good which superimposes itself over private interests. This makes the concept potentially interesting for our subject: can social security be considered to be such a collective good and if so what are the legal consequences of this qualification? Case law on this issue, especially that produced by the EU Court of Justice, is indeed helpful when answering this question. For example, case law kept the Dutch second pillar pension schemes out of the claws of the EU internal market regulation, which threatened to undermine the solidarity bases of these schemes.[1] It equally put a halt to full unbridled intra-community competition in the area of health care, threatening to undermine the local hospital infrastructure.[2] These are just two examples of important public interest exceptions which the ECJ formulated vis-à-vis social security schemes.

Yet despite the relevance of the case law, we should not overestimate the relevance of a legal 'public interest doctrine' for our subject. The concept is a typical example of an open norm, the meaning of which varies according to the legal regime, the

1 ECJ J 21 September 1999, C-115/97 to C-117/97 (Brentjens); ECJ 21 September 1999, C-67/96 (Albany International BV) and ECJ 21 September 1999, C-219/97 (Drijvende bokken).

2 See for example ECJ 13 May 2003, C-385/99, (Müller-Fauré and Van Riet).

specific context of the case and nature of government policies. This probably explains why there seems to be some reluctance amongst legal scholars to examine the nature of the public interest. Case law is complex when it relates to the boundaries between free market regulation and social values, generally those of the ECJ.[3] Recent attempts by the European Commission to develop criteria for determining 'social services of general economic interest' have also ground to a halt.[4] It is for this reason that we have decided to discard the public-interest-doctrine as a tool for answering our research question and instead to embrace the concept of state responsibility in relation to socio-economic fundamental rights, as this has been historically developed and recognized by international and constitutional law. Thus, for the purposes of this contribution 'public interests' refer to interests for which states bear responsibility. As we will see in the next paragraphs the legal doctrine surrounding socio-economic rights is useful for identifying such responsibilities in the area of social security.

3. THE HISTORICAL FOUNDATION OF SOCIAL SECURITY AS A SOCIO-ECONOMIC RIGHT

3.1. THE 'SOCIAL QUESTION' OF THE 19TH CENTURY

The legal concept of social rights emerged in the 19th century in Europe[5] not as a response to market failure, but as an institutional answer to the 'social question': how could the market and the representative, timocratic[6] political system be made compatible with the extension of political and social rights, without a socialist revolution?[7] The appearance of a powerful working class in continental Europe resulted in the formulation of new claims toward the state. Within this context, the recognition of enforceable social rights was one of the main demands of the social revolution of 1848 in France, especially with regard to the rights to work and education. However, this revolutionary current has not prevailed. The final version of the related article 13 of the French Constitution of 1848 replaced the initially proclaimed right to work by the freedom to work. Although it also guaranteed free primary education and the right to social assistance (art. 8), the conservative majority

3 Cf. Barnard 2000, p. 39–46.

4 Communication of the European Commission 26 April 2006, COM (2006) 117def. The commission has decided to no longer pursue this project.

5 Already in 1793, Robespierre had proposed to the Convention a Bill of Rights which recognized as legally enforceable the rights to work and to social assistance and which treated the right of property not as a natural or absolute right, but as one limited by the law and the needs of other people.

6 In UK – the most democratically developed country of this century – only 1.8% of the population had electoral rights before the Reform Act of 1832 and just 2.7% after it. In 1867 and 1884 the respective figures have been 6.4 and 12.1%. See Zakaria 2003, p. 80.

7 Preuss 1986, p. 152.

had made clear that the related state obligation was not a legal, but a moral one. Thiers, who two decades later was to quell the Commune of Paris (1871), summarised the final defeat of the quest for justiciability of social rights in these words:

> it is important that social obligations remain a moral virtue, that is, they must be voluntary and spontaneous (…). If, actually, a whole class instead of receiving could command, it would look like a beggar who preys with a gun in his hand.'[8]

The conservative countercurrent, archetypically represented by the Bismarckian paradigm, tried to solve the 'social question' with the introduction of social insurance, in tandem with repressive measures, such as the laws against the trade unions (1854, preceding Bismarck's chancellorship) and the socialist organizations (*Sozialistengesetze*, 1878–1890).[9] This reformist alternative was ideologically reinforced by the 'Christian Social teaching' of the Catholic Church (*die Katholische Soziallehre*) and its first important Encyclical on social rights, 'Rerum Novarum' of Pope Leo XIII (15/5/1891). It is noteworthy that in Great Britain during this period the predominance of 'laissez-faire' individualistic values did not allow many alternatives to the failure of individual achievement other than charity and self-help.[10] It is true that a reform of the old Poor Laws, the so called 'Speenhamland system', had been introduced in 1795, in an effort to appease the social tension and the ideological spread of revolutionary ideas. This 'system' provided an allowance from the public treasury to all workers whose pay fell below the subsistence level, but its failure was already evident in the 1830s. The Poor Law Commissioners' Report of 1834 defined it as a 'universal system of pauperism' and 'bounty on indolence and vice'.[11] It is also true that the influence of the revolution of 1848 can be detected in the Medical Act of 1858;[12] and Disraeli had attacked the existing social legislation on the ground that it was relying on the 'moral error' that aid to the poor is more a charity than a right. Still, it was only after the Second World War and the universalistic reforms of Lord Beveridge, that the United Kingdom approached the European concept of the welfare state and the related rights.

---

8 Rapport de la commission sur la prévoyance et l'assistance publique, 1850. Cf. Lavigne 1946, p. 262.

9 King William I of Prussia, in speech introducing of the new social legislation to the Reichstag (17 November 1881), stressed that: 'it is not a new, socialist element, but just the development of the modern State Idea (based on the Christian spirit) that the State, in addition to defence and the protection of vested rights, has also the obligation to contribute with positive actions to the welfare of all its subjects and especially the poor and the needy'. See Hentchel 1983, p. 333.

10 See Rimlinger 1971, p. 62.

11 Deane 1965, p. 144.

12 Vagero 1983, p.83.

However, the introduction of social legislation in continental Europe did not signify, initially, the constitutional recognition of socio-economic rights on equal footing with traditional rights.[13] The constitutionalisation of the social obligations of the state is, predominantly, a 20th century phenomenon.[14] At this time, social rights were established on the basis of socialisation of risk, through the expansion of the insurance technique, and not as fundamental rights of the same nature as traditional liberties. In any case, social rights are not 'socialist rights'.[15] They simply provide the legal basis for a political intervention in the economic sphere, in order to alleviate major inequalities, without infringing the primacy of the market.[16] They constitute an interface between the market, the state and the family, institutionalizing a kind of national solidarity that does not threaten market relationships. Hence, they do not constitute a breach of the capitalist system, but rather a breach *within it*. They have created a different kind of market to the supposedly self-regulated liberal one,[17] defined later by the conservative Ordoliberalists in Germany as the 'social market economy'.

3.2. THE CONSTITUTIONALISATION OF SOCIO-ECONOMIC RIGHTS

The incorporation of social rights in constitutions became widespread in Europe in the aftermath of World War I. This was mainly the outcome of a political compromise between liberal and social-democrat political forces (reflected also in the early legislative work of the International Labour Organization, founded in 1919), which aimed at the insulation of western European societies from the influence of the October Revolution. Even before the emblematic Constitution of the Weimar Republic (1919),[18] social rights were included in the Constitution of

13 Donzelot 1988, p.403–404.

14 Sporadic references to social rights, primarily to the right to education, were included also in liberal Constitutions of the 19th Century, such as the Constitutions of Portugal (1838) and of Denmark (1849).

15 Cf. Schmitt 1970, p. 169, where he characterized social rights as 'essentially socialist rights'.

16 Cf. Offe 1984, p. 61.

17 Supposedly, because there was never such a thing as a completely self-regulated market. Even proponents of the 'spontaneous order of the market', like Hayek, are not against the regulation of the market according to criteria of economic efficiency, not social justice, such as the removal of discriminations. Cf. Hayek 1980, p. 141.

18 The Constitution of Weimar was the first European Constitution to contain an elaborate list of social rights (art. 151–165), including an absolutely unique, both then and now, provision (art. 162), that proclaimed it the duty of the State to act on the international level to secure a minimum of social rights to the workers of the world. Article 151 § 1 incorporated a 'Social State' clause: 'The economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone. It is within these confines that economic liberty is protected. Legal force is permissible to realize threatened rights or in the service of superseding demands of public welfare. Freedom of trade and industry will be realized according to a Reich law' However, the theory and the case-law interpreted these provisions

Finland (1919) and a number of other constitutions followed: Estonia (1920), Poland (1921), Italy (1927), Greece (1927), Portugal (1933), Spain (1931, 1938) and Ireland (1937).

Although the social provisions of these constitutions were usually not enforceable in the courts, their enshrinement in the Constitution signified that social policy was no longer left to the discretion of the legislator. This fundamental constitutional decision to give to social provisions supra-legislative force was revised again in the aftermath of World War II, via a new compromise between social-democratic and Christian-democratic parties (with the exception of Scandinavian countries, where the dominant social-democratic parties took shape along a more egalitarian and inclusive welfare model, based on social citizenship.)

The constitutional recognition of social rights implied a change in the functions of the State: instead of regulating the market only on the basis of norms that derive from the private law of contract, property and tort,[19] the European state uses, in addition:

> political power to supersede, supplement or modify operations of the economic system in order to achieve results, which the economic system would not achieve on its own (…) guided by other values than those determined by open market forces.[20]

This 'market-correcting' function[21] reverberates the words of Abbé Sieyès, that the citizens have a right to demand from the state everything it can do for them.[22]

In order to define this new type of polity, German legal theory has developed the concept of the 'Social State' (*Sozialstaat*), enshrined in article 20 of the Fundamental Law. The term is now widely used throughout Europe, as a fundamental normative and organizational general principle of the Constitution, on a par with the Rule of Law. Indicative of its continental acceptance is the fact that the majority of the new democracies of Central and Eastern Europe have incorporated a similar clause in their Constitutions.[23] Nearly all countries in

---

as mere policy directives, deprived of any legal validity, without the intervention of the legislator. See Schmitt 1970, p. 169.

19 Cf. Hayek 1980, p. 141.

20 Marshall 1975, p. 15. Marshall was referring to social policy in general, but his description defines very precisely also the basic functions of the social state principle.

21 Cf. Deakin & Browne 2003, p. 28.

22 'Il suffit de dire que les citoyens en commun ont droit à tout ce que l'Etat peut faire en leur faveur'. Sieyès 1939, p. 70.

23 This radically different understanding of the state's role is dominant in the public opinion both in 'old' and 'new' Europe. Hence, in the last poll of Eurobarometer, a vast majority of citizens of the new Democracies of Central and Eastern Europe agree with the proposition that 'there is a need for more equality and social justice even if this means less freedom for the individual'. Poll carried out between 6 September and 10 October 2006, by TNS Opinion &

Europe – with the most notable exception being the United Kingdom – are social states, either comprising an explicit 'Social State' clause in their Constitutions,[24] or an analytical enumeration of social rights,[25] or both.[26]

Hence, the 'Social State' can be used as a distinct *terminus technicus*, not interchangeable with the term 'Welfare State': the latter is a descriptive concept, which denotes the universal type of state which emerged in all developed countries in the 20th century, as a response to functional necessities of the modern capitalist economy. On the other hand, the 'Social State' is a normative, prescriptive principle, which defines a specific polity, where the State has the constitutional obligation to assume interventionist functions in the economic and social spheres.[27] In this sense, the USA or Australia are 'welfare states' but not 'social' ones, as social policy therein has no constitutional foundation. Recent empirical qualitative studies show that, despite the greater emphasis on activation and individual responsibility associated with the pressure of globalization, real differences in welfare values remain between social and liberal welfare states.[28]

Moreover and more importantly, the Social State does not entail only the constitutional protection of social rights, but a whole series of new functions for public power that are specific to it and alien to the liberal state.[29] Social States are not solely obligated to abstain from the violation of fundamental rights, (the traditional 'negative' function of rights); they are also subject to a compelling, positive obligation to protect against infringement by third parties and to fulfil, i.e. to take the appropriate measures to ensure the actual implementation of all rights.[30] In this framework, the minimum core of welfare protection is beyond the scope of the powers of both the legislature and the administration, no longer

---

Social, a consortium created between Taylor Nelson Sofres and EOS Gallup Europe, accessible at <http://ec.europa.eu/public_opinion/archives/eb/eb66>. See the Preamble of the Constitution of Bulgaria and art. 1 para 1 of the Constitutions of Croatia and FYR of Macedonia, 2 of Slovenia, 6 para 1 of Russia.

24 As in article 20 para 1 of the German Constitution, art. 1 of the Constitution of France, art. 1 para 1 of the Constitution of Spain, art. 2 of the Constitution of Portugal, art. 25 of the Constitution of Greece.

25 See, e.g., the Constitutions of Belgium (art. 23), Italy (art. 2–4, 31, 32, 35–38, 41, 45, 46), Luxembourg (11, 23, 94), Netherlands (19, 20, 22) Greece (21, 22), Spain (39–52, 129, 148, 149), Portugal (56, 59, 63–72, 108, 109, 167, 216).

26 Cf. Katrougalos 1996a, p. 278.

27 On the divergence of American and European versions of economic constitution see also Heller 1996, p. 149–165; Katrougalos 1998, p. 56 ff.

28 Cf. Taylor-Gooby & Martin 2010.

29 All these functions are not necessarily associated only with the Social State principle, but they can derive from other constitutional foundations, such as the fundamental value of dignity, the principle of legitimate expectations (*Vertrauenschutzprinzip, principe de confiance légitime*),etc.

30 See more on that infra, on paragraph 4, cf. Koch 2005, p. 81.

'something that might be changed or abolished whenever the administration changes its political hue' but a constitutive element of social citizenship.[31]

4. SOCIAL SECURITY AS A FUNDAMENTAL SOCIO-ECONOMIC RIGHT; STATE RESPONSIBILITY

Every person, as a member of society, has the right to social security (…); so proclaimed article 2 of the Universal Declaration of human rights in 1948. Since then the right has also been adopted in international and regional human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR, art. 9), the European Social Charter (ESC, art. 12), the EU Charter of Fundamental Rights (CFREU, art. 34), as well as in the national constitutions of a growing number of states. In Europe it is enshrined, one way or another, in the Preamble of the Constitution of France, article 23 of the Constitution of Belgium, 22 para 5 of the Greek Constitution, 30 of the Constitution of Czech Republic, 75 of the Constitution of the Kingdom of Denmark, 28 of the Constitution of Estonia, 41, 47 and 50 of Spain, 3 and 45.4 of the Constitution of Ireland, 31, 32 and 38 of the Constitution of Italian, 9 of the Constitution of Cyprus Appendix D – Part II – Rights and Fundamental freedoms, 109 and 111 of the Constitution of Latvia, 38, 52 and 53 of the Constitution of Lithuania, 11 of the Constitution of the Grand Duchy of Luxembourg, 17, 60 and 70E of the Constitution of Hungary, 17 of the Constitution of Malta, 20 of the Constitution of Netherlands, 67, 68, 71 and 75 of the Constitution of Poland, 59, 63 and 72 of the Constitution Portuguese, 13, 50, 51 and 78 of the Constitution of Slovenia, 39 and 40 of the Constitution of Slovak Republic, 19 of the Constitution of Finland.

There is much conflicting opinion about the meaning of the right to social security as a fundamental right (and socio-economic fundamental rights in general).[32] On the one hand there are 'optimists' who believe that with some effort these rights can be given a concrete meaning. It could be argued that the social state principle dictates that the state should determine the scope of the social protection system and act as a direct provider of social security as a last resort, when the market fails. Merely regulating and facilitating the efforts of others is not enough. The rationale behind this is that benefits should be made available to everyone as a social right and this availability should not be jeopardized by the contingencies of the market.[33] Others suggest that socio-

31 Waldron 1993, p. 271–273.

32 Most literature refers to socio-economic rights in general, and not specifically to the right to social security. For an exception, see Riedel 2007.

33 Katrougalos 2009, p. 24.

economic fundamental rights, including the right to social security are or should be individually justiciable, in the sense that they should give rise to a right to concrete benefits. Proponents of this viewpoint can cite the increasing body of case law of constitutional courts in countries such as India and South Africa in which individual claims under socio-economic fundamental rights have been recognized.[34]

Yet, on the other side of the scale there are 'pessimists' who maintain that most of the socio-economic fundamental rights are merely amorphous policy guidelines, the legal meaning of which is shrouded in mist: too vague, too undetermined and too political. It is up to the legislator to decide how to organise social security and judges should respect the choices that are made.

Between these two extremes, there is one thing that cannot easily be contested and that is state responsibility. The inclusion of the right to social security in an internationally binding norm infers that it is the state which must be held accountable for the progress a country makes in the social security field. It is a simple consequence of international law under which states are legally bound to the treaty obligations they have adhered to. It would, for different legal reasons, also be the consequence of inclusion of social security in the national constitutions.[35]

In theory, state responsibility does not imply that the right to social security prescribes a specific division of powers between the state, society at large and the individual, let alone that it presupposes that the state should organize or administer social security itself. It can equally be contended that it should not be the state but rather society as a whole that should take primary responsibility, as classic fundamental rights tend rather to restrict the possibility of state interference. From this point of view it is more plausible to interpret the right to social security as implying that the right to social security could also be implemented by means of contractual rights and obligations between citizens and private parties, under the supervision of public power. Whatever may be said about this, it must be accepted that total state abstinence is no longer an option. Social security is a public concern and when the system fails to deliver, it is only the state that can be held accountable. Acceptance of social security as a constitutionally or/and internationally binding fundamental right makes it a compelling public *interest*.[36]

---

34 For a discussion of this case law, see the various contributions in Coomans 2006.

35 Pieters 1985, p. 448–449; Katrougalos 1996b.

36 It is interesting to connect this observation to the events that followed the recent credit crunch. As a result of the combination of the collapse of the stock markets and low interest rates, many privately run pension schemes have run into trouble. States in all the continents which rely heavily on such schemes have reacted to this by taking measures, often in the form

What are the legal obligations arising from state responsibility? According to the ICESCR the answer is that states 'must take steps (…) by all appropriate means (…) to achieve progressively the full realization of the rights to the maximum of its available resources'.[37] While some refer this matter entirely to the national political decision maker (bringing the matter at least within the public domain), others argue in favour of a further concretization of the obligations by independent experts and judges. In the meanwhile various attempts have been made to clarify the legal nature of socio-economic rights.[38]

Since the 1980s of the previous century a number of scholars have started to differentiate between various types of obligations that may arise from socio-economic fundamental rights: the obligation to respect, the obligation to promote and obligation to fulfil.[39] This method, which is increasingly gaining acceptance among human rights experts, turns out to be relevant for our subject. In the introductory chapter of this book we rejected the public- private dichotomy for social security because it does not take into account the various shades of grey that exist between these two extremes: the state plays a variety of roles, supported by a great number of different instruments. As we will see, the differentiated model of obligations is suitable for social security because it takes this variety into account.

At this stage reference should be made to an interesting document produced by the Commission of Economic, Social and Cultural Rights (CESCR), the General Comment No. 19. The CESCR is the committee of human rights specialist which guards over the application of the ICESCR. In order to clarify the socio-economic fundamental rights contained in the Covenant, the CESCR has started to develop so called general comments. For a long time, the right to social security as contained in article 9 of the Covenant, had not been the subject of a general comment, but the latest General Comment No. 19, adopted in November 2008 made an end to this.[40]

The general comment makes use of the distinction between the three types of obligations. Without entering into the full contents, let us take a brief look at the outcome of the reasoning.

---

of strengthening the public elements within the pension system as a whole. For an overview of measures that various state have taken in reaction to the credit crunch; cf. Katrougalos 2009.

37 Art. 2(1) ICESCR.

38 For an official attempt by human rights experts: the *Limburg principles on the implementation of the international covenant on economic social and cultural rights*, Maastricht 1986; on the impact of these principles: Martin 1996.

39 For an overview of the literature: Sepúlveda 2003.

40 The document can be accessed on the internet: </www.unhcr.org/refworld/type,GENERAL,CESCR,,47b17b5b39c,0.html>.

(a) Obligations to respect

> 33. The obligation to *respect* requires that State parties refrain from interfering directly or indirectly with the enjoyment of the right to social security. The obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate social security; arbitrarily interfering with self-help or customary or traditional arrangements for social security; or interfering with institutions that have been established by individuals or corporate bodies to provide social security.

So this is an unexpected outcome. The first obligation of the state is to not negatively interfere in private social security but to respect its integrity. At first sight it not easy to understand why a government would want to upset private social security arrangements, at least in a free and democratic society. But examples do exist. Thus we came across a recent ruling of the Canadian Supreme Court which overturned a ban on private health care insurance in the province of Quebec. Waiting lists in the obligatory universal health care services had induced some Canadian citizens to take out private insurance in order to be able to buy in preferential treatment. But in some Canadian provinces this was prohibited. The ban on private insurance was considered to be contrary to the right to life and personal integrity protected by the Quebec and Canadian Charter.[41]

(b) Obligations to protect

> 34. The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to social security. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to social security schemes operated by third parties or others, imposing conditions or providing benefits that are not consistent with the national social security system; or arbitrarily interfering with self-help or customary or traditional arrangements for social security.
>
> 35. Where social security schemes, whether contributory or non-contributory, are operated or controlled by third parties, States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security. To prevent such abuses an effective regulatory system must be established, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

41 Chaoulli *v.* Quebec, [2005] 1 S.C.R. 791.

The general comments move on: not only should private social security be respected, its proper functioning must also be protected. A more active role for the state is born, albeit not as direct provider but as regulator.

The regulatory function is particularly relevant in the area of collective agreements, being an important source for (supplementary) social security entitlements and for employee benefits in general, in particular second pillar pension schemes. The conviction that the state must play an active regulatory and supervisory role in this area has become more widespread, particularly after the bad experiences some countries have had with the introduction of a funded private pension system. At first sight such systems offer all sorts of advantages over public pay as you go schemes. The financial burden is shifted to another generation and funded systems include the promise of higher replacement rates. But there are also certain flaws attached to funded private pensions. The levels of benefit are dependent upon the return of investments which are not always prosperous and which may fluctuate, giving rise to differences in entitlements, not only in time but also between funds. Also there is the risk of bad management and failing administration. These risks have led to the belief that a shift from public to private pension schemes must necessarily involve the introduction of strict and effective regulatory and supervisory machinery.[42]

(c) Obligations to fulfil

> 36. The obligation to fulfil requires States parties to adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security. The obligation to *fulfil* can be disaggregated into the obligations to *facilitate*, *promote* and *provide*.
>
> 37 The obligation to *facilitate* requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation includes, *inter alia*, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national social security strategy and plan of action to realize this right; ensuring that the social security system will be adequate, accessible for everyone and covers risks and contingencies, namely income security, access to health care and family support. Examples of such steps include establishing a contribution-based social security system or a legislative framework that will permit the incorporation of the informal sector.
>
> 38. States parties are also obliged to fulfil (*provide*) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves within the existing social security system with the means at their disposal. States parties will invariably need to establish social assistance or other non-contributory

42 Cf. Holzmann & Hinz 2005. For the situation in the Balkan countries: Vonk 2007.

> schemes and/or provide support to those individuals and groups who are unable to make sufficient contributions for their own protection together with mechanism for the progressive coverage of all risks and contingencies.

Here, we find the foundation of the welfare state as a whole. States are expected to develop a strategy or policy with regard to the welfare state. This is left entirely up to the state's discretion, except where it involves the minimal care for those without any protection: setting up a system of social assistance is mandatory. The latter is a typical consequence of this present state obligation theory: the obligation is far more intense when it comes to guaranteeing the bare essentials, for further entitlements it becomes more diluted.

It is important to bear in mind that the general comment is not a binding legal source. Even after having been officially adopted by the CESCR, it does not qualify as a source of international law. For us the most important thing about the General Comment no. 19 is that it constitutes proof that it is possible to establish a normative framework for identifying state responsibility in social security with reference to the law. The general comment offers a perfect illustration of what such a framework might look like.

5. SOCIAL SECURITY; SUBSTANTIVE LEGAL STANDARDS

The differentiated model is not specifically designed for social security but applies equally to other socio-economic fundamental rights. It is a framework in the formal sense of the word; the exact nature of the obligations depends on the substance of the rights involved.

When dealing with the right to social security, we meet a considerable problem. The meaning of this right cannot easily be determined: it does not say what social security is or which social security model should be adopted. As a result, we do not know exactly what must be respected, protected or fulfilled. Indeed, it is doubtful that a universal model for social security could be developed anyway, or as the ILO puts it in its 2001-publication *Social security, a new consensus:*

> There is no single right model of social security. It grows and evolves over time. There are schemes of social assistance, universal schemes, social insurance and public or private provision. Each society must determine how best to ensure income security and access to care. These choices will reflect their social and cultural values, their history, their institutions and their level of economic development[43]

[43] ILO 2001, p. 2.

While accepting that there is no single model for social security and that social security in itself is a relative concept, an attempt could be made to formulate a list of core principles which do have more universal acclaim. Once such a list is established we can investigate to what extent the various principles are supported by concrete legal standards.

For the purposes of this article we propose a catalogue of seven core principles of social security, i.e.

1. *Protection*. Social security must provide adequate income protection. This assumes the existence of a system that provides protection against labour risks, such as unemployment and labour incapacity, and life risks, such as old age, excessive costs and, in the broadest sense of the term, poverty. The level of protection should ensure a decent standard of living.
2. *Universality*. The right to social security presupposes that the system is accessible to everyone, regardless of social position or professional category.
3. *Inclusion*. The system must be aimed at the citizen's participation in society via paid employment, sheltered work places or in some other way.
4. *Reliability*. The social security system must be durable and reliable. This assumes a proper balance between a solid financial basis and respect for accrued benefit entitlements.
5. *Solidarity*. Social security can only be realized when there is a certain degree of support from the strong for the weak. The financing of the system should at least partly be based on a collective responsibility of groups, in the widest sense employees, employers and the state and may for this purpose be rendered obligatory.
6. *Equality and non-discrimination*. Equality of treatment should co-exist with extra attention to vulnerable groups, such as the disabled, the chronically ill, and minorities. The system may furthermore not discriminate on grounds of gender, race, religion, etc.
7. *Good governance*. The system on which social security entitlements are based must be managed and implemented efficiently, transparently and without prejudice. Good governance also infers that the rights and obligations are vested in law.

These principles have different characteristics. In fact there are three groups. Principles one, two, three and four (protection, universality, inclusion and reliability) constitute *objectives* (as in French: finalités); numbers five and six (solidarity and equality) constitute *intrinsic values*; the last principle (good governance) could be considered as *pre-conditional*.

These seven principles are our list of 'outcomes' for which the state bears responsibility. Although these principles are only proposals, the result of

theoretical generalisation, each of them can be related to more rules that are clearly vested in international law or national constitutional norms. This is the objective of the last phase of our method: connecting principles to legal standards.

5.1. PROTECTION

There are various ways that the principle of adequate protection can be identified with legal standards of supra-legislative force. *First of all* the 'core content' of the right to social security can be taken into account. The core content can be seen as a method of interpreting socio-economic fundamental rights which is based upon the notion that each right contains a hard nucleus that is not to be negotiated under any circumstances.[44] The CESCR perceives the core content of social security as the minimum level of social security that is essential for acquiring water and sanitation, foodstuffs, essential primary health care and basic shelter and housing, and the most basic forms of education, which must be accessible on a non-discriminatory basis. In matters between life and death, it should be possible to establish this bottom line proposed by the CESCR. Although it may not be much it is a least something to fall back upon.

Secondly, it can be argued that the notion of protection cannot be fixed with reference to one specific standard, but that it depends on the circumstances of the case. This contextual interpretation would be similar to the so called 'reasonableness approach' adopted by the South African Constitutional Court and which has led to its famous sequence of socio-economic fundamental rights cases, dealing *inter alia,* with the bulldozing of townships without offering any support or compensation to its inhabitants (Grootboom-case), providing medicine to children with HIV/AIDS (TAC-case) and the right of permanent resident non-citizens to the South African old age grant (Khosa-case).[45] In general, the incipient case law relating to socio-economic fundamental rights of both national courts and international authorities, such as the European Commission of Social Rights, can be seen as a treasure chest for legal interpretations of protective standards provided by the right to social security.

Thirdly, reference can be made to minimum social security standards adopted by the ILO and the Council of Europe. There are a large number of such ILO instruments, both recommendations and Conventions. The mother of all conventions is considered to be Convention No. 102 which contains minimum standards for all branches of social security (but excluding social assistance).

44 Cf. de extensive study of Young 2008.
45 Liebenberg 2007; Olivier, Smit & Kalula 2003, p. 87–90.

Other conventions cover specific branches, such as industrial accidents and occupational diseases (No. 121), invalidity and old age (No. 128), and unemployment (No. 164). Besides these there are social security standards as part of categorical conventions which apply to specific categories of workers, such as seamen and migrant workers. The main instrument of this nature within the Council of Europe is the (revised) European Code on social security and, at a more general level, the European Social Charter. On the one hand these instruments contain sets of system requirements for each of the branches of benefit, on the other hand they formulate minimum percentages of coverage and of benefit levels. For instance, article 12 of the Revised European Social Charter, not only protects the right to social security as a fundamental social right, but in its paragraph 1 it that 'adequate' and 'effective' benefits are provided.[46] The European Committee of Social Rights in its interpretation of the European Social Charter, considers that the level of income-replacement benefits should be fixed such as to stand in 'reasonable proportion to the previous income and it should never fall below the poverty threshold defined as 50% of median equivalised income and calculated on the basis of the Eurostat at-risk-of-poverty threshold value'.[47]

Fourthly, the notion of protection can be given a more concrete meaning when judged in the light of the legal obligations which exist in the various national countries and, especially in Europe, in the light of social state principle. Just to give an example: when in the Netherlands the minimum level of subsistence is associated with 90% of the so-called social minimum, which in itself is derived from a percentage of the minimum wage (depending on household status), this might be considered as a point of reference for defining the minimum level of protection under the right to social security. This would infer that it would be contrary to the principle of protection to exclude certain groups from this minimum subsistence level, at least when there is no objective justification for doing so. In a similar line, the German case-law, considers that a social minimum with respect to a decent living, an '*Existenzminimum*' stems from the Social State's clause and the fundamental principle of human dignity, in relation to the right of life.[48]

---

46 Conclusions XVI-1, Statement of Interpretation on article 12, p. 11.

47 Conclusions XVIII-1 (Greece) p. 13, Conclusions XVIII-1 (United Kingdom), p. 520. In the latter, the Committee found the United Kingdom not to be in conformity with article 12§ 1 of the Charter on the grounds that at least for single persons the level of the Statutory Sick Pay, the Short-Term Incapacity Benefit, and the contributory JSA are manifestly inadequate. On the contrary, it considered the level of the old-age pension to be above the poverty threshold as a consequence of the compulsory second tier, the State Earned Related Pension, which is meant to complete the first tier, the Basic State Pension, and the introduction of the Stakeholder pension.

48 See art. 2 I of the German Constitution and BVerfGE 40, 121, (133), 82, 60 (80); 110, 412 (445), cf. also the recent decision on the Lisbon Treaty, BVerfG, 2 BvE 2/08 of 30 June 2009 and the

However, the most striking relevant jurisprudence is a series of decisions of the Hungarian Constitutional Court, which in 1995 unanimously rejected 26 provisions of an austerity package of social security reform.[49] Part of these judgments is related to the concept of 'legal certainty'. However, the Court also established that the right to social security contained in article 70/E of the Constitution entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realization of the right to human dignity.[50] In one of its early decisions, the Constitutional Court pointed out that the State is obliged to organize and operate a public system of social security.[51] Its further obligations in respect of the social security of its citizens are defined in a general manner by the provisions of article 70/E (1) of the Constitution. The legislature has a relatively great amount of liberty in determining the methods and degrees by which it enforces these constitutionally-mandated state goals and social rights. This liberty is not, however, unlimited,[52] as the welfare benefits may not be reduced to below a minimum level. The right to social security entails the obligation of the State to secure a minimum livelihood and not to reduce the benefits below the level necessary for the realisation of the right to human dignity.[53]

It is often argued that the notion of adequate protection goes further than providing a minimum subsistence level alone. Benefits should stand in a 'reasonable proportion' to the previous earnings of a person. When it comes to social insurance schemes which qualify as income replacement benefits, this point of view is supported by the relevant minimum standard conventions of the ILO and the Council of Europe.

5.2. UNIVERSALITY

The right to social security presupposes that the system is accessible to everyone, regardless of social position or professional category. This is recognised in article 22 of the Universal Declaration of human rights and fundamental freedoms which stipulates that everyone has the right to social security 'as a member of the society'. The vehicle of bringing social security to everyone is the national state. This infers that the universal acclaim is not an absolute one. Illegal

decision of 9 February 2010 on the validity of social assistance benefit levels 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09.

49 Decision AB, 43/1995 (VI. 30.), cf. also the Decisions 32/1991 (VI. 6.) AB, 26/1993 (IV. 29.) AB 42/2000 (XI. 8.) AB. Cf. Schwartz 2000, p. 92 ff.; Ferge & Tausz 2002, p. 176–199; Czúcz & Pintér 2002; Barr 2005.

50 Decision 32/1998 (VI. 25.), Decision 42/2000 (XI. 8.) AB.

51 Decision 32/1991 (VI. 6.) AB, at 163.

52 Decision 26/1993 (IV. 29.) AB, 196 at 199–200.

53 Decisions 43/1995 (VI. 30.) AB, 42/2000 (XI. 8.) AB.

immigrants, who are formally excluded from state membership, are often excluded from social security and international law does little or nothing to come to their rescue.[54] Also there are still many states where a fully fledged social security system has simply not yet come into being. 50% of the world population is not covered by any formal system of social security at all. The extension of social security to larger groups of the population of the third world remains a major challenge.[55] ILO minimum standards are hardly ratified by the poorer countries. Thus also the universal acclaim of these standards is not fully realised in practice.

It has been argued that this challenge can be realised better by a new social security instrument dealing with minimum subsistence schemes, than by increasing the number of ratifications under ILO Convention 102. This idea has been picked up by the ILO which is currently contemplating the possibility of developing a separate convention for a so called *social security floor.*[56] This kind of floor could be achieved by means of a convention that stipulates regulations for the most essential forms of support. The following are currently being considered in this context: basic healthcare, family benefits that allow children to attend school, focused programmes for work and support for the poorest of the poor, and a basic pension system for those who are no longer able to work. However, this is not true only for the developing countries. In the USA, for instance, President Obama's Health bill which will provide coverage to 31 million uninsured people, will still leave 23 million uninsured in 2019.[57] In the USA social security is not recognized as being a constitutional imperative. The situation is different in Europe. In Europe, the constitutional protection of social security, in tandem with the Social State principle, entails, by its nature, the universality of scope of its implementation as a right of social citizenship.

5.3. INCLUSION

The inclusion principle of social security has regained much attention ever since governments have embraced the idea of the 'activating welfare state'. Many policy documents stress the need of integrating social security beneficiaries into the society. Yet, the 'activating welfare state' as a legal concept has rarely been

54 Cf. Vonk 2002, p. 77–93. For a positive exception see for see the decision of ECSR of 20 October 2009 in the collective complaints procedure of Defense for Children against the Netherlands, No. 47/2008. This decision is however not legally binding, within the strict sense of the word.

55 Cf. ILO 2001.

56 See, among others, Cichon & Hagemeyer 2007, p. 169–196.

57 According to estimates of the Congressional Budget Office, see R. Pear, Senate Passes Health Care Overhaul on Party-Line Vote, New York Times, 24 December 2009.

examined.[58] And when examined, the conclusion is that a fully fletched right to integration or a legal doctrine on activation has not yet emerged.[59]

Despite these misgivings, two things must be pointed out. Firstly, the principles of social security, or indeed social security as a public interest, are not only reflected in the law by means of individual rights, but also by obligations. Obviously, obligations are as much part of the legal sphere as rights. It can well be argued that the obligation to be available and accept work is a necessary consequence of the reciprocity principle; it may not be nice for the individual, but it is in the interest of the society at large.

Secondly, even when solely focussing on rights it should be pointed out that the principle of inclusion is not entirely without legal protection. Before the advent of the new activating policies, the right to work emerged as a fundamental right. It is adopted in the national constitutions of many countries, as well as in various international instruments on socio-economic fundamental rights, such as the European Social Charter (art. 1 ESC) and the International Covenant on social, economic and cultural rights (art. 6 ICESCR). It is not easy to catch the meaning of this right in a single phrase. It suggests that everybody should be able to earn his living in an occupation freely entered upon. On the one hand it presupposes a positive obligation of the state to strive for a high and stable level of employment and to provide and promote employment services and occupational training. On the other hand it displays characteristics of a freedom right where it protects the freedom of occupation. In the latter sense the right to work is related to the prohibition of slavery and forced labour, adopted in the other human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (art. 6) the European Convention on Human rights (art. 4) and conventions of the ILO.[60]

Nonetheless, it is true to say that the introduction of the new activating welfare policies have done little to enhance the right to work as a fundamental right. On the contrary, these policies, in particular if they fall under the heading of 'workfare', have led to a negative shift in the balance between obligations and rights of social security claimants. Workfare policies come with more discretionary powers for the administration, more stringent criteria and harsher sanctions and not with more rights for the persons involved. Protective legal standards are far and in between.[61] In that sense one must indeed be careful not to associate these policies too closely with the inclusion principle anyway. It

58 Sol et al. 2008, p. 163.
59 Noordam 1987; Sol et al. 2008, p. 217.
60 E.g. Forced Labour Convention, 1930 (ILO, No. 29).
61 Vonk 2009.

would be better to seek protective legal standards elsewhere, for example in the area of rehabilitation services for the handicapped and the elderly.

5.4. RELIABILITY

While the long term sustainability of our social security schemes is primarily an economic issue, the balance between a solid financial basis and respect for accrued benefit entitlements is also a legal question. This question has entered the legal domain with the recognition that social security benefits should be considered as property rights. Social security beneficiaries can claim protection under this right when governments interfere with existing rights, for example for budgetary reasons. It is then up to the judiciary to decide whether any infringement of accrued rights is legitimate on grounds of overriding arguments, such as the long term financial viability of the system.

With respect to this issue, the case law of the German *Bundesverfassungsgericht* has particular relevance. This court has a long tradition in applying the constitutionally enshrined principle of peaceful enjoyment of property in the field of social security benefits.[62] In order to meet requirements prescribed by the German court, special transitional arrangements are required if social security schemes are negatively adjusted. In practice, these usually involve a gradual rather than an immediate implementation of adjustments, be it that in this process the legislator ultimately has discretionary powers in formulating such arrangements.

A more or less similar case law has evolved ever since the European Court of Human Rights has accepted that social security benefits fall under the concept of property rights, as protected by the first protocol of the European Convention on Human Rights.[63] Thereby the European Court does not refrain from calling cut backs in social security into question when it feels that the government does not pursue legitimate aims.[64]

In all, the shaping of transitory regimes accompanying cut backs in social security is firmly subject to legal scrutiny.

62 Cf. Schuler 1988, p. 131–134.

63 ECrtHR 16 September 1996, Gaygusuz v. Austria, Koua Poirrez v. France of 30.9.2003, Wessels-Bergervoet v. Netherlands of 4.6.2002, Luczak v. Poland of 27.11.2007.

64 ECrtHR 12 October 2004, Ásmundsson v. Iceland.

5.5. SOLIDARITY

Although solidarity can be voluntary, most often it is not. It is enforced by law. This can take various forms: obligatory statutory insurance, a duty to participate in collective or private schemes, or mere contribution or tax liability. Solidarity and forced participation in social security is very much an issue in European Community law where a line must be drawn between activities which come under the free trade and competition rules and activities which do not. Initially it seemed that only public social security institutions which operate purely on the basis of mandatory participation were not to be qualified as commercial undertakings within the meaning of European Community law.[65] The ECJ case of *Fédération Française*[66] had made clear that as soon as institutions move outside this domain they run the risk of being qualified as commercial undertakings. Such was the fate of the *Caisse Centrale*, the governing board of the French old age insurance scheme for farmers; the fact that this scheme was not mandatory but based upon optional participation played a major role in this decision. However, it has now become clear that the qualification of a social security institution as an undertaking is not crucial for answering the question whether social security schemes should come under free trade and competition law. Especially the *Brentjens* cases have been of importance here.[67] The question at stake in these cases was whether Dutch companies could be obliged to participate in occupational, second pillar pension schemes, even though this may run contrary to the freedom of movement of services and competition law. These schemes are based upon collective labour agreements. The ECJ ruled that the Dutch pension funds are to be considered as undertakings for the purposes of competition law. But this did not affect the outcome of the case. As the Dutch pension schemes are based on solidarity and serve social objectives, the exclusion of these schemes from competition law was considered to be justified on grounds of the general interest. The post-*Brentjens* case law has often been very tolerant vis-à-vis obligatory participation in non-statutory social security schemes. Thus in *Pavlov*[68], the duty for medical specialists to participate in Dutch occupational pension schemes was considered to be justified. In *Van der Woude*[69] the ECJ had no difficulties in accepting that certain Dutch contribution facilities for employees are only payable to those who are affiliated to a health insurance company chosen under a collective agreement. And in *Cisal*[70] it was beyond any

65 ECJ 17 February 1993, C-159/91 (Poucet en Pistre).
66 EC 16 November 1995, C-244/94 (Fédération Française des Sociétés d'Assurance v. Ministère de l'Agriculture et de la Pêche).
67 ECJ J 21 September 1999, C-115/97 to C-117/97 (Brentjens); ECJ 21 September 1999, C-67/96 (Albany International BV) and ECJ 21 September 1999, C-219/97 (Drijvende bokken).
68 ECJ 12 September 2000,C-180/98 to C-184/98.
69 ECJ 21 September 2000, C-222/98.
70 ECJ 22 January 2002, C-218/00.

doubt the Italian Institute for occupational accidents insurance could impose contribution liability on a building company. In short, all those claimants who hoped to circumvent their social security obligations by invoking EU free trade and competition law were let down by the ECJ. It is this type of case law which illustrates how much solidarity is alive in legal practice not only as a bone of contention for some individual claimants, but also as a point of reference in case law.

5.6. EQUALITY AND NON DISCRIMINATION

The legal basis of the principle of equality can be easily established. Equality has two objectives. *Firstly*, there is the core principle of non-discrimination. Any lawyer will recognize the meaning of this principle as an important safeguard against governmental arbitrariness. He will be aware of the difference between direct and indirect discrimination and recognize the importance of the so called objective justification test on grounds of which discriminatory measures may be justified by certain objectives, provided that these measures are necessary and proportionate. He will appreciate that direct discrimination on certain grounds such as race, gender and religion is *prima facie* suspect, while in matters of indirect discrimination judges retain considerable leeway to strike down discretionary provisions or allow such provisions to continue to exist.

Secondly, the principle of equality requires a policy that compensates inequalities and protects vulnerable groups. The legal standards that meet this part of the principle of equality can be found in the special treaties and conventions, such as the Convention on the Rights of Persons with Disabilities or the Convention on the Rights of Children. International treaties protect all kinds of vulnerable groups that bear social risks that are hard to secure. In the Netherlands, the relevance of international law can be illustrated by the events that followed upon the privatisation of the public invalidity insurance scheme in 2004. As a result of this privatisation pregnant self-employed women were left unprotected as no insurance company would offer them insurance (for the insurance companies it would be unwise to do so, as the risk of payment is 100%). Hence, with regard to pregnant women the privatisation was regarded to be contrary to international treaties, such as the UN Convention on the protection of the rights of women. This claim was not awarded by the Dutch Courts on purely formal grounds, but nevertheless the legislator adjusted the system and created a special scheme for this group (the so-called 'Self-employed and pregnant scheme').

5.7. GOOD GOVERNANCE

It could be considered quite controversial to include a principle such as good governance in our catalogue. It is potentially so large that it is capable of swallowing up all the others. However, here it is used in the narrow sense of the word. Social security is not only a matter of good intentions. It requires stable machinery for supervising claims and delivering benefits. For us the notion of good governance refers to the standards which define a proper administration of the schemes. Such standards can be found in various laws, sometimes specifically designed for social security, sometimes of a more general nature. Thus, acts do not only regulate the legal status of the administrative institutions and their powers, but also the time limits within which decisions must be taken or benefits must be delivered, transparency rules, the protection of personal data, the involvement of interested parties, client participation, etc. As a matter of fact, the involvement of third parties in the administration, in particular employer and employee organisations is also prescribed by international minimum standards on social security.[71]

Good governance also presupposes that social security is governed by the rule of law. The rationale behind accepting the rule of law as one the principles of the right to social security, is related to the distinction between the pre-modern concept of charity and the contemporary concept of social security as a right. This difference has a legal connotation. Charity does not presuppose a legal obligation to provide benefit; this is a matter of discretion for the charitable institution which is – at most – under a moral obligation to deliver. As a result in a charitable system there cannot be any corresponding right to a benefit either for the recipient. The right to social security however presupposes a system under which persons are entitled to support. This suggests that the beneficiary has some sort of legally defined position and there is access to justice, in particular in terms of the possibility to bring disputes before an independent tribunal which has the power to take binding decisions. This is the right to a fair and public hearing as laid down in article 6 of the European Convention on Human Rights and Fundamental Freedoms. The various aspects of the right to a fair and public hearing have been codified in national and international rules; there is an abundance of case law (also in relation to social security disputes[72]) and a large body of legal doctrine. The subject is broken down into numerous sub-principles: access to court (full jurisdiction, legal aid, etc.), right to a fair trial (equality of arms, the right to adverse proceedings, etc.), public trial and public pronouncement of judgment, the reasonable time requirement, independent and impartial tribunal, the presumption of innocence, etc.

---

71 Cf. art. 72 ILO Convention No. 102.

72 Referring to the famous cases of the ECrtHR in Deumeland and Feldbrugge of 29 May 1986, appl. 8562/79 and 9384/81 and subsequent developments.

The 'rule of law' eventually requires subordination to all human rights. Many of them have been proven to be of importance to social security, in particular the right to property, the prohibition of discrimination and the right to privacy.[73]

6. CONCLUDING REMARKS

In the introduction to this paper we raised the following question: does the law provide a basis for defining social security as a public interest and to what extent is this interest supported by concrete legal standards? As we have seen, legal doctrine relating to socio-economic rights supplies us with a formal framework of state responsibility and consecutive claims of the individual. The main thing that we have learned from this framework is that state responsibility for social security is predominant, although it does not rule out the involvement of private and collective arrangements. Under the doctrine of state responsibility any division of power is feasible as long as it realises the objectives of social security. At the same time, it must be realised that the responsibility lies on the shoulders of the state when it comes to providing the minimum protection. The state must at least provide a minimum subsistence level. Furthermore, a system of basic social insurance cannot do without a strong element of state interference either, as the necessary solidarity amongst the insured population presumably will not arise spontaneously. When dealing with additional benefits the state can more easily fall back upon a regulatory or facilitating role.

Our formal framework of state responsibility needs to be supplemented with a substantive notion of social security. For the purposes of this article seven principles were identified which constitute the core of social security: protection, universality, inclusion, reliability, solidarity and good governance. These principles have been put to the test as regards the presence of concrete legal standards. We have found that these principles are somehow supported by international or/and constitutional law, albeit some more than the others and in differing degrees of concreteness. For example, the principle of equality of treatment is much more part of the legal domain than the principle of inclusion.

The fact that social security principles are supported by the law is not surprising. These principles constitute an expression of the public interest in social security and the law is an important instrument for safeguarding this interest. This should, as such, not be confused with a preference for public social security. Law is an instrument to regulate the public and the private sphere alike.

---

73 For the impact of the case law of the ECrtHR: Social security cases in Europe: The European Court of Human Rights (2007).

THE PUBLIC INTEREST AND THE WELFARE STATE: CONTEMPORARY POLITICAL PHILOSOPHY

Onno Brinkman

1. INTRODUCTION[1]

If a few centuries of political philosophy would have to be summarized in a few words, one could say that it is a quest for the right balance between the concept of the individual as an autonomous being who is responsible for his own life course, and the concept of an individual as a social animal who can only give meaning to his life in relation to the community in which he lives. This quest for the right balance is particularly relevant in theory formation with regard to social security. After all, social security can be described as the collectivisation of risk cover. Thus, by definition, social security transgresses the boundaries of individual interests. The essential question here is what the relationship between the individual and the public interest should be. This chapter addresses contemporary political-philosophical opinions regarding this issue.

This chapter looks at the role played by today's political philosophy based on the proposition that as a result of what is known as the 'Keynesian consensus' of the 1960s and 1970s, the reciprocity between the public and private interest gradually unravelled. There was no longer any distinction between both types of interests because the respecting of private interests by the state was justified by economic theories about state expenditure, such as social security payments. Private vices became public virtues, to misuse the words of Mandeville in this context. When, however, the Keynesian paradigm became stranded in the 1970s, the relationship between the private and the public interest had to be reassessed. However, the political philosophy of that time could no longer be of any help.

[1] In writing this chapter more use has been made of the following general introductions: Fleischacker 2004; Hampsher-Monk 1992; Kymlicka 1990/2001; Scruton; 1981/1985; Wiser 1983 and Stanford Encyclopedia of Philosophy. With a view to readability no more separate references shall be made to these works.

If it can be said that the entire history of Western philosophy consists of a series of footnotes to Plato, with the same exaggeration the same can be said of the relationship between Rawls and modern-day political philosophy. It is however not an exaggeration to state that the publication of Rawls' 'A Theory of Justice' in 1971 represented a revitalizing of normative political philosophy, which was much needed at that time.[2] The book broke through a post-war academic stance, which left no space for normative statements about political justice. The prevailing logical positivism dictated that statements were only meaningful if they could be empirically proved. Statements related to social justice obviously fell outside this category. In the United Kingdom Isaiah Berlin defended the plurality of values, between which, he argued, it was in principle impossible to choose.[3] Subsequently the French structuralists, such as Foucault, announced the end of modern time. According to them the post-modern time no longer accommodated 'big stories' such as Marxism or Christianity.

This chapter is structured as follows. It starts with a brief description of the philosophical background of social security and the departure point of modern political philosophy. The following paragraphs explain contemporary philosophy. I would like to point out at this point that the issue 'social security' is not at the heart of the modern politico-philosophical debate. If social security is mentioned at all by the various theories, it is only indirect. As a consequence the following paragraphs do not focus on social security *stricto sensu*, but they examine what each separate movement has to say in general about the relationship between the public and private interest in the welfare state. First of all focus is on egalitarian liberalism, as described by Rawls. It will then become clear that 'A Theory of Justice' cannot only be seen as a starting point for contemporary political philosophy, but also as a fixed point. Other movements included in this chapter can be seen as a response to Rawls' work, as they implicitly, but more often explicitly refer to it when launching other forms of egalitarian liberalism, such as the 'luck egalitarism' that is related to egalitarian liberalism but which emphasises individual preferences more strongly. Subsequently liberalism sees the emergence of a conflicting movement in the form of liberalism focussing more on self ownership. This is followed by an examination of the criticism aimed at the resurgence of liberalism. Harsh criticism of the liberals' vision of the individual as the ultimate moral agent and the neutral state came from the communitarian quarter. Although communitarians can recognize individual normative interests (although they do not necessarily do so), the public interest is always given an intrinsic normative value.

---

2 Rawls 1971. In later years Rawls has his theory amended and adjusted to communitarian and pluralist critics. In 1999 he published a revised edition. In this chapter reference is only made to the 1971 edition.

3 Berlin 1958/2002.

The analytical approach to the concept 'public interest' refers back to Rousseau. The theme of this chapter is the interpretation of the public interest by the respective philosophies: is the public interest the sum of each individual interest or should the public interest be summarized as the *volonté générale* as described by Rousseau. The contemporary debate between liberals and communitarians is therefore about the definition of the public interest. Where the liberals have a predominantly instrumental interpretation of the public interest – namely as an instrument for attaining individual goals –, in the communitarian approach the public interest is the end in itself, to which in extreme cases, individual aspirations are subordinate.

To conclude, a balance is made. At the end of this chapter the different movements are examined alongside the developments in social security and an evaluation is made of how far the movements have visibly influenced these developments. Key here is the question how far they have been able to contribute to the need for a new look at the relationship between the public and the private interest in social security. Here the problem arises that the philosophies, as noted above, do not usually comment explicitly on the specific position social security has with respect to the public interest. Neither is it true that the developments in social security can be exclusively linked to a particular philosophy or, conversely, that a particular philosophy necessarily leads to one specific model of social security. This means that this balance is largely intuitive and exploratory in nature.

Finally, a note regarding the scope of the subject. Strictly speaking, given the subject of this book, the description of the modern political-philosophical movements could be limited to the opinions of them regarding the nature and scope of the public interest. It does not need to include the relevant legal justice theory. This would, however, render this chapter unreadable, and probably make it incomprehensible. For this reason I have taken the liberty to loosely combine remarks regarding the role of the public interest in the relevant theories with an examination of the content of these theories.

2. THE COMMUNITARIAN ROOTS OF SOCIAL SECURITY

Social security is rooted in communitarian ground.[4] Bismarck's 19th century Germany, to which the origins of social security can be traced, was dominated by Hegelian-Marxist ideas. As we know, Hegel dismisses Kant's range of liberal ideas, in which the individual autonomy is central. Hegel saw the state as the vehicle of

4 Much in this paragraph is derived from Dupeyroux 1966 and Vloemans 1980.

the world spirit, to which individual interests were, when necessary, subordinate. The central role of the state, as formulated by Hegel, found its way into the social democratic body of thought via Marx. Of course there is a world of difference between Hegel's and Marx's concepts of the state. For the first, the state was the objective, for Marx the state was merely a tool in the transition phase to communism, and would ultimately disappear. Both, however, agree that the state is the level at which the public interest is defined, whereby Marx assumes that the state ceases to be necessary once the public and private interest converges, a conclusion that has not been adopted by the social democrats. The Hegelian-Marxist influence over social security in its infancy is expressed in its focus on the employee's labour relationship. Individuals need labour in order for them to strike a balance with nature. A proportional reward is thereby required, or a reward in proportion to the labour performed, so that humans do not become 'alienated' from nature. The public interest in social security aims to provide a fair – in other words a wage-related – reward during temporary periods of inactivity.

Catholic doctrine, the other communitarian source of social security, is also based on the fair wage.

> '… remuneration for labor is to be such that man may be furnished the means to cultivate worthily his own material, social, cultural, and spiritual life and that of his dependents, in view of the function and productiveness of each one, the conditions of the factory or workshop, and the common good' (2nd Council of the Vatican, Constitution, on the church in the world of today, Gaudium et Spes, 7 Dec 1965).

The mere fact that the parties have reached agreement is not sufficient to morally justify the wage amount. But there has always been a strong strain against the concept of state in catholic (and protestant) teachings. Augustine views the state simply as being the result of the Fall, of the human desertion of God. The true state is The City of God. This argument continued to form the basis for the Catholic Church's approach to the state, even after the 'social issue' also became an important issue for the Catholic Church in the second half of the 19th century. Thus the encyclical Rerum Novarum, published in 1891, also has strong sentiments against the state. In this encyclical the Church announced a corporatist vision of society, in which the public interest is represented by communities of interested parties. In shaping social policy the state was granted only a supplementary – subordinate – role. This resulted in many European states having many corporatist features, especially those in the southern catholic countries. But the Netherlands too has a corporatist tradition, in particular where implementation is concerned.[5]

[5] But not only where implementation is concerned. The history of the Dutch old age insurance in the late nineteen fifties is a good illustration of the clashing and merging of the state's position with respect to these two forms of communitarianism. The social democrats worked

Although both these – continental – schools have different views of the role of the state, they both allot the same task to the public interest. The public interest lies in determining the fair wage in return for labour and a wage-proportional benefit during times of inactivity. This standard of justice prevails over individual interests. After all, the fair wage is determined on the basis of material – non-neutral – politico-philosophical notions of what a fair wage is, over which the autonomous individual has no influence.

The liberal influence over social security can be traced to the Anglo Saxon quarter. First and foremost we can point to utilitarians such as Jeremy Bentham and John Stuart Mill, who contributed substantially to the 19th century reforms in the United Kingdom. The reforms introduced by Roosevelt in 1929 in response to the Great Depression form a more recent contribution. Where the response on the continent to the Industrial Revolution was initially political, the measures introduced with the New Deal linked the elimination of poverty to measures to promote the recovery of the economy. The philosophical background to these measures was American pragmatism. Furthermore these measures were justified by the up and coming economic theory of Keynes by which government expenditure on social security payments could be defined as a stimulus for the economy.[6] For this reason the question as to the form given to the public interest (state or other forms of community) that arose on the European continent never became an issue in the United States. The New Deal led to a system of flat-rate benefits – based on the subsistence minimum, not on notions of justice –, whereby the autonomy of the individual was respected by maintaining the freedom of communication between employee and employer. The public interest lay in the recovery of the economy, which would ultimately make it possible for the free market to once again resume its regulatory function. It is this form of social security that, through the Beveridge Report, influenced the West European systems established in the aftermath of World War Two.

---

for the introduction of a state pension. The confessionals feared the intervention of the state would be too great and stuck to the vision of insurance upon which the classical Bismarck model is based. The compromise: a national insurance, whereby the full title of the benefit entitlement is indeed the insurance, but whereby the coverage of this insurance extends to the entire population, including the non-working population. The implementation was in the hands of regional Councils of Labour, a council of employers and employees under the supervision of a chairman appointed by the state. In other words materially a state pension, but in the shape of an insurance scheme.

6 Keynes himself did not make explicit conclusions about the macro-economic consequences of social security expenditures. His main focus was the eradication of unemployment. For that reason it is not correct to point to Keynes as the ideologist of the modern social security concept. Andries Nentjes brought this to my attention. Keynes' influence on Roosevelt however is undeniable. Moreover, the politician Keynes endorsed, and even promoted, the Beveridge report. Anyhow, the post-war political perception of Keynes' economic theories provided a strong legitimacy to the extension of the welfare state.

The social security systems that came into being after World War Two in the Western European welfare states are founded on an amalgamation of these philosophies, which embraced strict notions of justice with regard to the public interest. Little by little these ideological theories of justice made their way into the 'Keynesian consensus', which had begun to dominate the Western world. As stated earlier this consensus originated in the US in the thirties and was exported to West Europe in the shape of the Marshall Plan. The West European welfare state was able to develop by virtue of the Keynesian notion that government expenditure increases demand and thus promotes economic development. The Keynesian paradigm also included the merging of the private and public interest, or at least they became less easy to distinguish from each other. After all the remuneration of private wishes and preferences through extensive social security schemes also benefited the public interest. In a nutshell, this ultimately led to the 'permissive society' of the 1960s and 1970s, when the public interest ceased to be recognisable. Where social security was concerned this meant that the concept 'reciprocity' was pushed into the background.

When the Keynesian paradigm faltered and the supply economy took over, national states were forced to scale-down their welfare state schemes. This called for a new definition of the public interest, which was necessary in order to redefine the division of responsibility between the state and its subordinates. The concept 'reciprocity' had to be re-examined. But, as we recalled in the introduction, the academic ideas in force at that time had no room for normative statements about political justice. The traditional ideologies of the welfare state had lost their resilience. Neither social democracy nor Christian democracy had an answer to the questions that arose following the demise of Keynes. Neither could traditional liberalism come up with an alternative. When Friedrich Hayek discussed this political movement in his famous article in 1973,[7] he referred to it in the past tense. He observed that liberalism had only a few supporters left, and these were mainly to be found among economists (such as himself).

Thus the scene is set against which today's philosophical debate takes place. As we have already seen, contemporary political philosophy presented itself in the form of 'A Theory of Justice' by John Rawls in the early 1970s. Rawls had been expanding his theory since the nineteen fifties and important parts of it were already published.[8] However, these publications were largely unnoticed outside the circle of colleagues. It was not until the 1970s that conditions were right for his theory to take off.

7 Reprinted in Hayek 1982, p. 119–151.

8 The majority of these publications are contained in Rawls 1999.

Rawls' attempts to reconcile the concepts 'freedom' and 'equality' in a single normative theory, 'A Theory of Justice' provided for the (European) need for a theory that once again gave substance to the concept 'reciprocity', without it being necessary to relinquish the principle fundaments of the welfare state. Both social democrats and liberals were (and are) inspired by this in their new approach to the public interest.[9] This resulted in liberalism regaining its position as a political factor and in social democracy focusing more on the responsibility of the individual. Only among the Christian democrats did Rawls fail to gain support. For this his emphasis on the autonomy of the individual was too great.

3. EGALITARIAN LIBERALISM

Rawls was a reader and great admirer of Kant all his life.[10] As a consequence his ideas regarding the individual and the public interest are also much influenced by him. This applies in particular with regard to his basic assumption that every individual person is a moral entity. Here Rawls adheres to the categorical imperative of Kant that the individual human exists as a subject in itself, not merely as a tool for the random use of others.[11] Every individual, suggests Rawls in imitation of Kant, is a free and reasonable human individual planning (and perhaps adjusting) his own course of life unconnected to his position in society or his relationships with other individuals. In this context liberals refer to the individual as 'the unencumbered self', a concept that has come in for much criticism from communitarian quarters, as we shall see below.

The basic liberal assumption of Rawls is thus that individuals are responsible for their own future, but, and here the egalitarian side of Rawls puts in an appearance, undeserved inequality between individuals may not affect the possibility for an individual to shape his own future. Talent and origins are not moral merits and in a just society they should therefore be excluded as being criteria for the division of welfare.

Foremost in Rawls' theory is thus that it is up to the individual to put his own life plans into action: the state must remain neutral with respect to different conceptions of the good life. In Rawls' eyes the public interest has no intrinsic moral value; the state is 'a cooperative venture of mutual advantage'.[12] The

9 Hereby it must be noted directly that this was not Rawls' intention. As an American he is, as we shall see later, not committed to the European model of the welfare state.
10 Kant 1785/1997, p. 81.
11 Kant 1785/1997, p. 81.
12 Rawls 1971, p. 4.

central question Rawls asks himself is under what conditions the state can regulate the conflicting individual interests so that the individual members of the society can optimally realise their life plans.

Rawls therefore sees the public interest as being the 'well-ordered society' within which the individual human is able to optimally realise his ideal of the good life. This does not imply that a well-ordered society must provide for all the wishes and requirements that an individual can think of. To Rawls the neutrality – and definition – of the public interest means that the state is only responsible for the just division of the so called 'primary goods'. Rawls understands primary goods to be the basic liberties, equal opportunities to hold social office, income and wealth and the social basis for self-respect, such as the possibility to start a family and to join organisations. These are the 'Lego blocks' that make it possible for every reasonable individual to plan his own future in his own way and which are fairly divided within a 'well-ordered society'. It is not a public interest to realise personal preferences that cannot be satisfied using the primary goods.

The core of Rawls' argument is based on the principle that this division takes place on the basis of the principle that 'free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association'.[13]

With this Rawls returns to the tradition of the social contract, as developed by Hobbes, Locke and Rousseau. However, his model of a social contract is substantially abstracter by nature. He does not refer to a historical original position, but he places the – notional – participants in the social contract in a fictive original position, whereby they are ignorant of their social place in or value to society. In the original position the participants are, in the words of his famous metaphor behind a 'veil of ignorance'. With this mental experiment Rawls attempts to enable the participants to formulate the just society on the basis of moral principles and not based on their expectations regarding the manner in which their specific individual qualifications and skills shall be valued in the society designed by them. Rawls' claim is that the contract participants placed in such a fictive original position shall opt for the following two principles of justice for distributing the so called primary goods.

In the first place each person has an equal right to the same *basic liberties*. The basic liberties of individuals are the right to the integrity of the person, freedom of speech etc. These basic liberties can be traded off against each other, but this trade-off must apply to everyone in the same way; in allocating the rights and

13 Rawls 1971, p. 11.

implementing the trade-offs no distinction whatsoever may be made between individuals.

The second principle is hierarchically subordinate to the first and concerns the distribution of *social and economic goods*. It is the best known part of Rawls' theory. Rawls permits inequalities in the distribution of social and economic goods to individuals, but in a just basic societal structure these goods are distributed in such a way that each inequality benefits the worst-off members of the society (the famous 'difference-principle'). This is attached to the condition that offices and positions are open to all. In other words, everyone must have equal opportunity to obtain the same social and economic benefits.

Rawls is indeed referred to as the philosopher of the liberal welfare state,[14] but this typification is not without its problems. Indeed, in his later work Rawls even explicitly rejects the capitalist 'welfare state':

> Welfare state capitalism (…) rejects the fair value of the political liberties, and while it has some concern for equality of opportunity, the policies necessary to achieve this are not followed. It permits very large inequalities in the ownership of real property (productive assets and natural resources) so that the control of the economy and much of political life rests in few hands. And although, as the name 'welfare state capitalism' suggests, welfare provisions may be quite generous and guarantee a decent social minimum covering the basic needs, a principle of reciprocity to regulate economic and social inequalities is not recognized.[15]

Although in his 'Theory of Justice' Rawls does not yet adopt a position with regard to the type of community that best reflects his principle of justice theory, or which does so not at all, this harsh judgement of the capitalist welfare state still does not come totally out of the blue. This can be explained with reference to the part played by reciprocity in the difference principle. '(T)he difference principle expresses a conception of reciprocity. It is a principle of mutual benefit.'[16] The cooperation of all can only be assured through the application of the difference principle: it gives the worst-off a concrete incentive to play their part as they are able to share in the profits; on the other hand, it is a just basis on the grounds of which the better endowed and socially better equipped individuals can expect to receive the cooperation of all for the benefit of the common interest.[17] Although he does not say so as such we can glean from Rawls' criticism of the welfare state that he is concerned that social security could undermine the reciprocity principle and in so doing deny the citizen his liberties.

---

14 In the Netherlands: Van der Burg 2003.
15 Rawls 2001, p. 137–138.
16 Rawls 1971, p. 102.
17 Rawls 1971, p. 103.

Or, to put it more strongly, a benefit granted by the state erodes the autonomy of the individual. After all Rawls' basic starting point is that the free citizen shapes his own future. In this portrayal of the citizen it is fitting that the citizen takes precautionary measures *ex ante* to enable him to cope with any misfortune that may come his way. By compensating misfortunes *ex post* the state runs the risk of creating a benefit-dependent 'sub-class'.[18]

In other words Rawls also sees a public interest in the maintenance of the reciprocity principle. Rawls distinguishes two problems that could undermine the 'difference principle' as a result of the reciprocity being broken. First of all he refers to the so called 'free-riders' problem. How do you avoid the situation in which an individual ceases to make his contribution to the community because he will get his share anyway? Alongside this he distinguishes the 'prisoner's dilemma' as being potentially damaging to the difference principle. Why should I make my contribution to the community if I cannot be sure that my neighbour will do so too? This means that a society cannot operate without some form of state that is able to monitor whether and penalise if the citizen fails to deliver his or her fair share:

> Therefore, to maintain public confidence in the scheme that is superior from everyone's point of view (…) some device for administering fines and penalties must be established. It is here that the mere existence of an effective sovereign, or even the general belief in his efficacy, has a crucial role.[19]

Rawls' Theory of Justice inspired many subsequent authors to publish their own interpretation of egalitarian liberalism. Many authors have endeavoured to refine or improve Rawls' Theory of Justice. However, they continue to work within the framework of the question posed by Rawls as to how the neutral public interest of the autonomous individual can best be promoted.

3.1. CAPABILITY APPROACH

Thus Sen argues that what individuals can make of their lives cannot depend exclusively on the degree of access that individuals have to primary resources.[20] As an alternative, Sen proposes the concept of 'basic capability equality', which

---

18 Here Rawls touches upon the recurring theme in the work of Foucault that the social institutions consolidate the balance of power within society.

19 Rawls 1971, p. 270.

20 While writing this chapter 'The Idea of Justice' was published, a summary in which Sen integrated (and perhaps slightly popularized) all his earlier work. In this book he further formulates his objections to egalitarians such as Rawls. He opposes any transcendental concept of justice instead proposing a 'realization-focused comparison' not aimed at the establishment of the ideal society but at a gradual improvement of the capabilities of the inhabitants of especially (but not only) the developing countries. Sen 2009.

also takes into account the personal potential of the individual to be able to shape his or her future.[21] This idea also affects the interpretation of the public interest. After all the state need not concern itself with the distribution of primary resources but with the development of the individual's basic capabilities, through which an individual is able to shape his or her own future. These basic capabilities include health, being able to enter into relationships with others (which the state can support by creating institutions such as marriage) and being able to participate in the political decision making process.

3.2. LUCK EGALITARIANISM

Other egalitarian liberal philosophers argue that the emphasis placed by Rawls on the equal distribution of primary resources is at the expense of individuals' notions of the good life, and the choices they make as a consequence. Rawls does not distinguish between the hard working factory worker who is willing to work overtime and the surfer in Malibu who spends half the day on the beach and makes shift with a modest income. On grounds of the difference principle the surfers in Malibu should indeed have a share in the output of the factory workers' overtime. The so called luck egalitarianism therefore makes a distinction between brute bad luck and risks consciously taken 'bad option luck'. The individual bears full responsibility for risks consciously taken. He can take out – private – insurance against these, but state intervention would be paternalist. The public interest relates solely to the removal of inequalities that are the result of brute bad luck, for instance origin, lack of talent or physical defects.

The best-known advocate of the luck egalitarianism is Dworkin.[22] His target is equality of resources. In other words everyone should possess the same level of resources with which they can shape their own future. To achieve this Dworkin has come up with a new variant of the contract theory. He hypothesizes a desert island and imagines a group of people are stranded there and form a new community. How should they distribute the island's resources? Dworkin proposes they have an auction: every member of the community receives the same measured quantity of clamshells, which they can use to bid for the island's resources. An individual who likes apples will bid a higher price for an apple tree than will an individual who likes pears. The idea is that at the end of the auction, when everyone's shells are finished, the island's resources will have been

21 See for example Sen 1979. Martha Nussbaum has elaborated upon this 'capability approach' in a large number of articles and books. A (temporary?) conclusion was made by her in Nussbaum 2006. There is an association, of which Sen was the first chairman, and Nussbaum the next, for promoting the concept 'capability approach': <www.capabiltyapproach.com>.

22 Dworkin 1981. Dworkin himself however did not consider himself to fully represent the 'Luck Egalitarism', see Dworkin 2003.

distributed in accordance with the personal preferences of each member of the community, so that nobody has cause to be jealous of another individual's parcel of resources.

But Dworkin can't stop there. One individual will be better equipped than another to achieve a happy life with the resources purchased at the auction. After all, talent and physical qualities are unequally distributed. An individual who, as a result of brute bad luck, was born blind is entitled to – financial – compensation because his handicap limits his capacity to shape his own future. Dworkin therefore supplements his auction theory with an insurance scenario as a means of determining the amount of this compensation. He claims it is a public interest to provide coverage against the risks that the stranded person would have guarded himself, if he was unaware beforehand whether he would incur the risk, whereby everyone has an equal chance of incurring the risk. The amount of tax – or social security contributions – to be levied is determined based on the amount of the hypothetical insurance premium that in such a case the inhibitors of the island would be willing to pay.

Dworkin thus claims it is a public interest that everyone is equal at the starting gate from which position they can make their own life choices. Everyone must be given the opportunity to achieve the same degree of happiness. Obstacles to such happiness, for instance lack of talent or physical defects should therefore be removed using resources financed from public means. However, if an individual's future is derailed by misfortunes that are the result of the individuals own life choices, then the state no longer acts as a safety net. In this case the solution must be sought in the private sphere. An individual who is blind from birth is entitled to a benefit financed from public means; the individual who loses his sight setting off fireworks is only entitled to an invalidity benefit if he has taken out private insurance against such a risk.

Other 'luck egalitarians' go even further than Dworkin and claim 'equality of welfare'. They do not take into account the starting gate but the final position.

3.3. DEMOCRATIC LIBERALISM

Elizabeth Anderson has expressed important and influential criticism of the 'luck egalitarianism'.[23] Her chief objection is that luck egalitarianism violates the equality that should underlie the relationship between all individuals.

[23] Anderson 1999. She does not explicitly state that her criticism also includes Rawls. According to Pierik 2007, a distinction should be made between Rawls and Anderson on the one hand ('citizen egalitarism') and Dworkin and others on the other hand.

Anderson claims that if it is a public interest to compensate a citizen due to lack of talent, or birth defects, in doing so the state not only expresses a moral, but also an offensive opinion regarding the ability of a citizen to live a fulfilling existence.[24] In her eyes luck egalitarianism is based on the implicit implication that some individuals are unable to obtain quality of life. As an alternative to luck egalitarianism Anderson proposes 'democratic liberalism', which assumes all individuals are fully equal, making it unnecessary to compensate specific categories of individuals. It is, however, in the public interest that everyone is able to participate fully in social and political life, whereby the cause of an individual's physical or mental defect is, in principle, irrelevant. The individual who his unable to walk as the result of a birth defect, is not entitled to compensation because his life is supposedly incomplete, but he is, however, entitled to any resources that allow him to lead a life that is as normal as possible, for instance a wheelchair. In other words Anderson does not consider distributive justice as being a criterion in itself for compensating individuals who are worse-off due to factors that are morally irrelevant. From her argument that society is a system of cooperation it follows that she supports the notion of a safety net, also for less careful individuals, this can be defined in the form of a minimum wage or invalidity insurance schemes. Mandatory social insurance for medical care is also in the public interest according to Anderson. Her reasoning behind this is that everyone is entitled to medical care, even the heavy smoker. It follows from this that everyone must contribute by means of premiums or tax. This is not paternalist as luck-egalitarians may think, after all everyone is at liberty to refuse such medical care if is offered to him.

4. LIBERTARIANISM

4.1. NOZICK

'Individuals have rights, and there are things no person or group may do to them (without violating their rights).' With this powerful and famous opening sentence Robert Nozick lays his claim in his book 'Anarchy, State and Utopia' for 'the minimal state' in which there is no room for the state as distributor of social justice.[25] Nozick's book can thus also be seen as a plea for the minimization of the public interest. With this book, which was published in 1974, and that is a direct response to 'A Theory of Justice', Nozick entered acceptable circles, in particular those of the American intellectuals, and has thus (together with

[24] Her examples are hilarious. For instance she gives examples of a letter from the hypothetical State Equality Board with the following tenor: 'Sir, you have been born so ugly that you may never find happiness in marriage. You are therefore eligible for damage compensation.'

[25] Nozick 1974.

Hayek) laid the philosophical grounds for the economic neoliberal reforms of Reagan and Thatcher.

Nozick's theory is based on the assumption, and here he does not differ substantially from Rawls, of self-ownership. But whereas Rawls describes society as a communal enterprise focusing on mutual advantage, Nozick accepts no such responsibility for the fate of others. A society is based on voluntary cooperation, whereby the members of the society, contrary to what Rawls believes, do not have a normative relation. Rawls stated that the participants in the social contract are reasonable human beings (in other words are able to take the interests of others into account) who plan the course of their lives in a rational manner. Nozick does not distinguish such a basic Kantian standard in the mutual relations between individuals.

From the concept 'self-ownership', as summarised by Nozick, flows the concept of absolute property rights and the justification of the free market (property-ownership). Where Rawls was greatly influenced by Kant, Nozick is inspired by Locke. According to Nozick, property can only be 'justly' acquired on the grounds of three principles. First of all is the principle of transfer, what is justly acquired can be justly transferred. This is the principle upon which the free market is based. The principle of just initial acquisition explains how an individual first acquired a good that can be transferred in accordance with the principle of transfer. A good that is appropriated from nature without causing disadvantage to others, can be justly transferred. The third principle, the principle of rectification of injustice provides for rectifications of violations of the first two principles. These three principles are jointly referred to by Nozick as his entitlement theory.

It is important to dwell upon the principle of initial acquisition, the principle that legitimates property appropriation in the initial natural state. The assumption is, as we have seen, that ownership in the natural state is justly acquired through appropriation, such as the picking of fruit or the tilling of the land. As a result of self-ownership, an individual has an inviolable right to that which is produced by the labour his own body.[26] The fact that an individual has the absolute right of self-ownership means that justly acquired property cannot be disputed in any way.[27] This privatization of the common property is however subject to one condition. It must not result in other individuals in nature being

[26] According to John Locke's statement regarding property acquisition: 'Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.' Locke 1690, Sec. 27.

[27] It is this mental leap in particular for which Nozick came in for much criticism, because it was claimed that it lacked a philosophical base; see for example Nagel 1975.

worse-off than they would have been if privatization had not taken place. In other words: you have to make sure there is enough left over for others. Locke also laid down such a condition and it is therefore referred to as the 'Lockean proviso'.[28]

The entitlement theory is the starting point of Nozick's political philosophy. Rather than a contract theory he uses the invisible hand explanation of his interpretation of the state. According to his theory, which makes no claim to historical correctness, in the state of nature individuals shall spontaneously, as if driven by an invisible hand, form protective associations to guard their acquired property against attacks from third parties. These separate protective associations shall, Nozick goes on to suggest, not fight out their differences among each other but shall lay them before a third organisation, the dominant protective association. These associations are the first forms of state. In Nozick's words:

> '…there arises something very much resembling a minimal state'.[29]

But this is as far as the public interest goes as far as Nozick is concerned. He rejects all forms of state that go beyond a minimal state, the night watchman state, and which intervenes in matters such as the distribution of welfare and education, because such a state breaches his entitlement theory and in doing so is an unacceptable violation of its citizens' rights of ownership. Nozick most strikingly suggests that the levying of taxes is on a par with forced labour.

Thus Nozick also abhors political philosophies, such as those advocated by Rawls and Dworkin that are based on a desired pattern for the distribution of welfare. The best known example used by Nozick to explain his horror of patterned theories is that of Wilt Chamberlain, the top NBA basketball player at the time his book was published and still a legendary name. Suppose, says Nozick, that a community has been created in which a just system of income distribution applies in line with notions of justice stated beforehand (a patterned theory). Now suppose that Chamberlain has concluded a contract with his club under which he shares in the takings. How in this case can the patterned theory be applied to solve the problem that arises when it appears that people are willing en masse to pay an additional 25 cents to see Chamberlain play? These shifts in income, which make Chamberlain a rich man, lead to a disturbance in the pattern that had previously been stamped as the only form of just distribution. Do the incomes have to be distributed again to return to the original just distribution? And what happens if people want to watch Chamberlain again?

---

28 '…no man but he can have a right (…) at least where there is enough, and as good left in common.' Locke 1690, Sec. 27.

29 Nozick 1974.

Will there be redistribution? Nozick shrinks from the state intervention that would result from this.[30]

Political theories such as Nozick's (and Hayek's) have influenced the neo liberal economists who, led by Friedman, sought a new way of allocating responsibility with respect to social security. Pinochet's Chilli was used as a pilot project for a new pension system. A defined contribution scheme was introduced, under which the amount of the contribution is fixed but the amount of the benefit is not guaranteed, being dependent on the results on the stock exchange. This model has been adopted in many South American countries. The schemes, under which pension risks were borne collectively, were wholly or partially replaced by private savings accounts, which are not based on solidarity, but by which the individual bears the risk associated with the yield of his investment. As a result multi-pillared pension schemes were usually created; an individually borne second pillar was added to the collectively financed first pillar. This multi pillar model has been adopted by the World Bank,[31] and therefore also forms the basis for the pension reforms in many Central and East European countries. Much more modest forms of private savings accounts have also been introduced in Sweden and the UK. In America itself this form of financing is used for occupational pensions. Even before the advent of the credit crisis, however, it appeared that this pension system failed to yield what was expected of it. Not only were the profits on the stock exchange disappointing after the Internet bubble burst, but, in practice the administrative costs turned out to be disproportionately high.[32] The World Bank also partially retraced its footsteps to the extent that the report published in 2004 entitled 'Keeping the Promise' gave greater import to the collectively financed pillars.[33]

Nozick is generally referred to as a right libertarian. This, however, only applies with respect to his economic opinions. With regard to ethical issues Nozick is unmistakably left-wing. Alongside Nozick there are also left libertarians and libertarians who can be considered as being much more right-wing. These qualifications can be awarded in accordance with their interpretation of the Lockean proviso. To start with the extreme right libertarians, for instance Rothbard,

30 With this sort of criticism Nozick is close to Friedrich Hayek, another source of inspiration for him, who in his famous book 'The Road to Serfdom' saw state intervention in the well being of the individual as the first step down the road to dictatorship.

31 See the report by the World Bank: 'Averting the Old Age Crisis' of 1994.

32 Fultz 2004.

33 It is apparent that pension beneficiaries in countries that have embraced this form of national capitalism most enthusiastically, for instance in Bulgaria much more than Poland, are being hit hardest by the crisis. Because with respect to ten years ago the stock exchanges have made no progress, no pension accrual whatsoever has taken place. On the other hand, there is no guarantee that the collectively financed systems will survive the current crisis, although the most recent reports are apparently more positive about this.

refuse to accept that there are any moral conditions attached to the acquiring of property.[34] If an individual has the right to own his own body it follows that everything an individual appropriates from nature belongs to that individual as long as the bodily integrity of others is not violated. Rothbard leaves so little room over for the public interest that he should in fact be seen as an anarchist.

4.2. LEFT LIBERTARIANS

The left libertarians, who, just like Nozick attempt to minimize the role of the public interest while trying to link it to an egalitarian notion of the distribution of resources, are indisputably more interesting from the point of view of the social security debate. Left libertarians base their ideas on the assumption that the natural resources are common property. However, whereas Locke and Nozick accept that an individual may acquire property as long as others do not become worse-off as a result, left wing libertarians argue that the acquisition of property may never detract from other individuals' rights to the common property. In other words, left-libertarians do not accept the Lockean proviso as justification for the acquisition of property. In the words of Tideman & Vallentyne (2001):

> Unlike right-libertarianism, left-libertarianism holds that natural resources (land, oil, air, etc.) are owned in some egalitarian sense and can be legitimately appropriated by individuals or groups only when the appropriations are compatible with the specified form of egalitarian ownership.

A striking example of this movement is Philippe van Parijs (1988), who, on the basis of libertarian motives argues for a basic income. He arrives at this conclusion in two stages. (a) Everyone has an equal claim to all the natural resources. (b) To keep state intervention with regard to the distribution of these resources to a minimum this claim can best be expressed in the form of a basic income. Moreover from (a) it follows that the granting of a basic income may not be subjected to conditions. This brings him to the conclusion that individuals, who have a preference for spending the whole day on the beach at Malibu, are also entitled to a benefit. Hereby he also notes that the amount of this benefit need not be above subsistence level, and that over-priced surfboards do not fall within the justified expenditure pattern. Rawls warded off this criticism aimed at Van Parijs by supplementing his list of primary goods with leisure time.

A frequently heard criticism of left libertarians is that they adopt a progressive position that, for political reasons, is packaged in a neo-liberal argumentation.[35]

---

34 Rothbard 1998.
35 Fried 2004.

Now that the neoliberal tide would seem to be turning, we will see whether left-libertarianism can continue as an independent movement.

5. COMMUNITARIAN CRITICISM

The Communitarian roots of social security were described earlier in this chapter, namely the Hegelian-Marxist and Catholic doctrine. It is striking that present-day Communitarianism is almost entirely disconnected from these roots. Echoes of Marxism are virtually inaudible in the social security debate, in reality the same applies for the confessional philosophies.[36] Present-day communitarianism is first and foremost a response to liberal philosophers such as Rawls and Nozick, not a continuation of the past. But history does repeat itself. Whereas Hegel is a response to the liberal enlightenment ideal, the communitarians oppose the budding liberalism of Rawls and Nozick.

The different communitarian writers are linked in their criticism of the liberal concept of the neutral state. They propose the 'embedded self' as an alternative to the 'unencumbered self', the individual who is embedded in the context of the environment in which he lives, for instance his family, is not (fully) in a position to determine his own aims as an autonomous being.[37] Communitarianism consists, no more than liberalism, of a homogenous group of authors. The spectrum is broad. As two extremes in this spectrum we will examine two very different authors, Alasdair MacIntyre and Michael Walzer, who only have in common their criticism of Rawls' and Nozick's liberalism.

5.1. MACINTYRE

MacIntyre remains in tune with the Catholic tradition by resolutely rejecting the state and through his references to Catholic icons such as Thomas van Acquino and St. Benedictus.[38] However, he is first and foremost the modern advocate of the re-examination of Aristotle's virtue ethics. For him, defending these classical values means that he fundamentally rejects the Enlightenment Project, including the liberal nation-state that he considers to be a product of the Enlightenment. What we have lost as a consequence of the Enlightenment is a common *tells* ('objective'). He believes we no longer have public standards for gauging what a

36 The political scientist Jos de Beus called it remarkable in a recent TV programme that the Christian-democrat prime minister in the Netherlands sought inspiration from among the American communitarian Etzioni rather than falling back on the European Christian heritage.

37 See for example Sandel 1984.

38 For this paragraph use have been made of, among others, Murpy 2003.

good life is. The result of this is a pluriformity of values in which an individual is no longer able to convince another individual that he is right.[39] MacIntyre illustrates this by comparing Rawls and Nozick. Both are in the right insofar as the principles they believe in work out. Their principles are, however, irreconcilable. MacIntyre (1981) takes this seriously. In his eyes modern politics is 'civil war carried on by other means'. In this context he also talks of a social catastrophe.

What is MacIntyre's alternative to the Enlightenment Project? Central to MacIntyre's political philosophy is the concept of the 'common good'. The concept of the 'common good' is not, as is the concept of the 'public interest' advocated by the liberals, subordinate to the separate interests of individual members of the community, but has an intrinsic normative value. First and foremost the members of a community are bound by a common understanding of the good life. Examples of human communities are the family, neighbourhoods and professional groups. In this context MacIntyre explicitly refrains from referring to the state. The good life is not the result of common activities in these communities, but rather the manner in which this result was achieved. Individual members of the community find their value and self-respect through the manner in which they contribute to the 'common good'. Examples of the manner in which individual members can contribute are the concepts derived from Aristotle's' ethics such as ability, professional pride and merit. In defining the good life a major role is attributed to the public interest. This is namely the role of 'governing institutions' in creating an arena in which the good life can be defined in common deliberations. It is important that no one is excluded from this debate. For MacIntyre this is an important as well as a practical reason to reject the modern nation-state: it is quite simply too big to enable everyone to have their say. McIntyre is, however, first and foremost a moral rather than a political philosopher. He has never developed his theories about the right form of government any further, although they are grist to the mill of supporters of the corporate model.

5.2. WALZER

At the opposite end of the communitarian spectrum we have Walzer (1983), who claims to belong to the social democrats.[40] His arguments regarding distributive justice contained in his book 'Spheres of Justice' find expression in his assumption that human beings are most of all social beings. Walzer attempts to reconcile this conviction with the principles of the liberal nation-state.

---

39 In fact he comes to the same conclusion as Isaiah Berlin (see note 4). Berlin however took this conclusion much more light-heartedly. Put more strongly, he considered this to be a requirement for a strong democracy.

40 For this paragraph use has been made, among others of Trappenburg 1994.

In Walzer's opinion the public interest is the common definition of the good life. This definition is not the sum of what individuals envisage, but is the result of a quest for standards already existing within the group. Walzer is not searching for objective truths and universal opinions in his theory of distributive justice, but for the hidden meanings of shared values, 'shared meanings', as these apply in the existing community. In his eyes philosophical notions of a just and egalitarian community are always hypothetical.

> If such a society isn't already here – hidden as it were in our concepts and categories – we will never know and realize it in fact.[41]

Thus Walzer considers Rawls' social contract to be nothing but a clinical mind experiment that says little about what happens in real life let alone that it contributes to a more just society.

The importance attached by Walzer to the research and explanation of 'shared meanings' has resulted in his concept of justness being bound to the borders of the national-state.[42] After all shared values only have meaning and remain meaningful if they can be set-off against the shared values of other groups; otherwise they lose their ability to differentiate.

Walzer calls for equality within the borders of the national state. The manner in which goods are distributed must recognize and confirm the equality of the members. But Walzer's concept of equality is complex. In a liberal society it is permitted to distribute resources unequally provided the differences are limited within a single sphere of justice. Walzer argues that the modern liberal nation-state has different spheres of justice, such as politics, education, health care etc., between which watertight partitions must be erected whenever just distribution is concerned. The powerful politician is not entitled to priority treatment with respect to health care; children of millionaires have no right to special treatment when it comes to education.

The specific communitarian element in Walzer's argument is, as observed above, the great importance he attaches to shared meanings. Thereby the community itself also attends to the needs of its members:

> But one of our needs is community itself: culture, religion and politics. It is only under the aegis of these three that all other things we need become *social recognized needs*, take on historical and determinate form.[43]

---

41 Walzer 1983, p. XIV.

42 Another consequence is that his book is very narrative, which has resulted in it being criticised as anecdotal.

43 Walzer 1983, p. 65.

Walzer explains this with reference to, among other things, health care. The importance currently attached by Western society to good health can, according to Walzer, only be understood in the context of present-day culture and its level of knowledge. Today's health cult would mystify the mediaeval man, who sought only spiritual welfare and who put up with physical discomforts.

5.3. ETZIONI AND GIDDENS

Since the 1990s communitarianism has been highly influential as a counter balance to liberal notions. The emergence of these philosophers coincided first and foremost with a growing social dissatisfaction about the lack of 'values and standards' and the state's neutral disposition. As a result ideas related to a morally tinted public interest were surreptitiously included in the formation of public opinion. In the Netherlands this was fodder for the debate about society's 'standards and values' that emerged during the 1990s.

But communitarianism also became so influential due to authors such as Anthony Giddens and Amitai Etzioni who formulated the communitarianism philosophy, both in their books and in their personal recommendations to government leaders, in such a way that it became suitable for political use.[44] Giddens was the founder of the Third Way ideology, the movement that attempted to link neoliberalism with the communitarianism of social democracy. This movement sought to find a balance between the social democrat concepts such as Community (community-minded) and Opportunity (opportunity for individuals to advance themselves), and the liberal principles of Responsibility and Accountability (between individuals and the government). In doing so he helped to found the New-Labour movement under Tony Blair, and in general boosted the revival of social democracy in Western Europe during the 1990s. In the Netherlands, the Third Way ideology opened the door for a coalition between the social democrats and the liberals.

Etzioni's work focuses on strengthening the moral foundation of modern societies. Although he uses the individual and his rights as a starting point, he is concerned about the dislocating and alienating effects of an ideology that allocates overmuch importance to individualism and the free market. For this reason he calls for a better balance between the individual and the community.[45]

---

44 Well known books by them are Etzioni 1996 and Giddens 1998.

45 Bovens 1998.

6. BALANCE

At the start of this chapter reference was made to the need that arose in the mid 1970s, as a result of the running aground of the Keynesian consensus, for a new look at the relationship between the public and the individual interest in social security. It was claimed that this consensus had led to the watering down of the differences between the public and private interest. Once it appeared that the validity of Keynes' economic theory had run its course, it became necessary to reformulate the relationship between the public and private interest. This is followed by is a description of the major movements in political philosophy that have endeavoured to respond to this need. The distinction between liberalism and communism is a red thread running through this description.

Liberals are united in their opinions regarding the autonomy of the individual and the neutrality of the state. Egalitarian liberalism formulates the public interest as being a 'joint venture' for the benefit of the individual participants. It puts strong emphasis on reciprocity because the cooperation of all is needed to make the joint venture a success. Through this the concept of distributive justice, including social security, acquires instrumental characteristics: it is considered by these liberals as a means to ensure the cooperation of all. Libertarians do acknowledge a common fate, but this goes no further than providing mutual protection in the face of external threats. The public interest is principally revealed in the protection of the inalienable rights of the individual, in particular the right of ownership. The private interests can be best realised through the operation of the market.

Communitarians oppose both notions. In their eyes the individual can only be comprehended as part of the community in which he lives: as a result the individual is not autonomous and neither is the state neutral. By its very nature communitarianism is immersed in the reciprocity principle. After all the very core of communitarianism is that the individual can only develop in interaction with the community.

At this point the question arises as to how the developments in social security since the 1970s can be explained on the basis of these antipoles. The developments within social security display a hybrid picture, within which a number of trends can be distinguished. On the one hand these developments have been derived from libertarian thoughts, inspired by Nozick, on the other hand they can be reduced to communitarian ideas regarding the role of the state and the individual.

The first response to the economic crisis that manifested itself in the late 1970s as a result of the collapse of the Keynesian paradigm, is of a financial-economic nature. Cuts are made in the system by reducing the level of benefits. Alongside this 'volume management' is practiced by tightening the entitlement requirements, or introducing or extending qualifying periods. This budget-based approach to social security stems from libertarian ideas of the public interest within social security. The community no longer feigns full responsibility for the welfare of the individual and will only continue to provide the primary guarantees for his existence.

In later years there is a further neoliberal sequel to this budget-based response, as the operation of the market is seen as the means for best realising the private interest. This resulted in parts of the social security system being privatised. In the Netherlands this resulted, de facto, in the abolition of the Sickness Benefit Act, which was replaced by an obligation under private law for the employer to continue to pay wages. The employer can choose whether or not he wants to take out insurance to cover this risk. In addition major parts of the health care system were privatised, whereby public guarantees were created with regard to the scope of the care package and the contribution amount. In other European countries private elements are creeping into the pension systems, as described earlier in this chapter.

On the basis of these developments it should not be assumed that neoliberal or libertarian ideas had the upper hand. Other trends demonstrate communitarian leanings. Firstly, the community's boundaries are being more strictly defined. The declining growth in welfare in the 1980s, in combination with an increasing flow of migrants, put the issue of welfare distribution on the agenda. Where less can be distributed, the circle of entitled persons has to be more strictly limited. Solidarity can only be applied within a group that has a certain degree of commitment. Or in the words of Walzer: 'The idea of distributive justice presupposes a bounded world within which distribution takes place: a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves.'[46]

In the Netherlands this was expressed most markedly in the shaping of the Dutch admissions policy of foreigners in combination with the introduction of the so called Linkage Act in 1998. The admissions policy for immigrants is becoming increasingly restrictive in nature. Whereas in the 1960s and 1970s migrants were actively sought after, since the 1980s only labour migrants who can explicitly show that they have an added value for the labour market, are being admitted (for instance knowledge migrants) or those who are prepared to perform low

46 Walzer 1983, p. 31.

skilled work that the native Dutch population refuses to perform. At the same time the introduction of the Linkage Act meant that those persons not admitted to the Dutch labour market could no longer call upon public services, for example the right to social security.

As such these restrictive measures do not necessarily have a communitarian strand. If resources are becoming scarce, it is in the interest of the separate members of the group to mark the circle of people who are entitled to share in the distribution of goods, and to exclude those who do not contribute to the common good. For that reason the Linkage Act can also be understood within the liberal paradigm.

However, the tightening of the circle of solidarity went hand in hand with a new evaluation of the relationship between the public and private interest. This reassessment revealed itself in a stronger emphasis on the reciprocal relationship between the citizen and the state. This emphasis on reciprocity in social security means that benefits and work have become more closely connected. The principle goal of social security is no longer income protection; the goal is shifting towards the return to work, whereby in return for his benefit the individual has obligations imposed upon him intended to bridge the distance to the labour market.

This communitarian reassessment of the relationship between the private and the public interest must be analytically distinguished from the neoliberal trends described above. Communitarian and neoliberal movements do have parallel interests – both movements aim to reduce the state's (financial) contribution to the private interest-, but they do not have parallel motives.[47] Whereas the neoliberal or libertarian tendency is based on a public interest that is normatively neutral, the communitarian movement has strong normative visions regarding the best way in which an individual can do justice to himself. The communitarian standard is based on the working individual and if necessarily the community actively encourages behavioural changes to achieve this standard.

For social security this means that a stronger emphasis is put on reciprocity. On the European continent the source of the 'activating social security' was to be found in the Scandinavian countries as early as the 1970s. These Scandinavian programs are based on the assumption that the universal coverage of the welfare state remains intact, but that within this model strategies are sought to lead those eligible for benefits back to the labour market, whereby greater demands are made on individual responsibility. The community activates the beneficiary 'for his own good', to participate (again) in the working life.

47 Anderson 2009.

In Anglo-Saxon countries reciprocity is stimulated slightly more. In these countries since the 1980s programs have been set up under the name Workfare, in which all able-bodied beneficiaries are obliged to participate and which focus less on the personal development of the beneficiary in the longer term. The old moral biblical standard: 'If any do not work, neither shall they eat.' seems still to be predominant in these countries.

In the Netherlands these communitarian developments can be found particularly in the reform of the disability benefit scheme and the Work and Social Assistance Act. Incapacity for work is no longer interpreted as a numeric concept, the presumption is that no one is fully incapacitated for work and hence all individuals incapacitated for work should make themselves available on the labour market to make use of their remaining capacity for work. In fact this means that the traditional distinction made in social security between incapacity for work and unemployment is fading. The granting of social assistance is also less automatic. Obligations to apply for jobs are being tightened, even for groups that were previously exempted, such as single mothers.

To conclude, another effect of the increasing reciprocity is an increase in punitive elements in social security as a means of encouraging behavioural effects. In the Netherlands the Act on Fines and Measures entered into force in 1996, on the grounds of which benefits can be (partially) withdrawn and fines can be imposed when compliance rules are violated. In the introduction to this chapter it is claimed that modern philosophy started with Rawls. But where does 'Rawlism' stand now in relation to the libertarian and communitarian trends in social security described above?

There is no easy answer to this question. The troublesome relationship between Rawls and social security has been summarised earlier in this chapter. After all Rawls' starting point is the free citizen creating his own course of life. In this vision of the citizen, the citizen himself must make arrangements to deal with any misfortune, for instance by saving or taking out private insurance. In this the state is expected to remain neutral, because the moral autonomy lies with the individual. In this respect Rawls is fully in line with the liberal tradition and would distance himself from communitarian concepts of social security with normative features, because these features would violate the individual autonomy.

On the other hand the function of the public interest is to regulate the private interests so that full justice can be done to them. Hereby, as we have seen, the concept of reciprocity plays a major role. For Rawls is the difference-principle a form of reciprocity, that forges the link between the interests of the autonomous individual and the neutral state. Social security can help the difference principle

to take shape. The most important question Rawls hereby lays before the participants of the social security debate is how a bridge can be built between libertarian opinions regarding the autonomy of the individual and communitarian concepts of reciprocity. In his eyes reciprocity between the public and private interest may not be at the expense of the freedom of the individual (and the self-respect that can be derived from such freedom), which would be the case if the public interest is painted too normatively.

Political philosophy remains a quest for the essence of the individual: the individual seeks the protection of the community, but while doing so it does not wish to lose too much of his autonomy. The same quest applies to the theory of social security.

7. EPILOGUE

While this book was being written it was announced that as a result of the current financial crisis the number of people in the world suffering from hunger has risen to more than one billion.[48] This adds urgency to the question of whether the national state is properly representing the public interest in social security. If egalitarian liberals see a public interest in the discarding of morally irrelevant factors such as talent and origins for the sake of a just distribution of welfare, the question of whether an individual's country of birth is not equally such an irrelevant factor is unavoidable. This question, first posed by Peter Singer a year after the publication of 'A Theory of Justice', has led to a wholly new, parallel debate about justice world-wide, and the question of how the public interest should be given substance.[49] This debate heavily emphasises that the state is not an absolute entity when it comes down to realizing the public interest.

48 NRC Handelsblad, 20 June 2009.

49 Peter Singer 1972. Singer approaches this question from a utilitarian point of view. See for an egalitarian-liberal outlook Beitz 1979 and Pogge 2004.

PART B

THE INSTRUMENTALISATION OF THE PUBLIC INTEREST

INSTRUMENTALISATION OF THE PUBLIC INTEREST IN SOCIAL SECURITY: AN ECONOMIC PERSPECTIVE

Andries Nentjes and Edwin Woerdman

1. INTRODUCTION

In our chapter on the economics of the public interest in social security we made a distinction between the period of building up social security and, from the late 1970s on, its revision. The instruments applied by the government in the two periods are basically the same: regulation of the private sector and bringing the provision of social security under direct government control. The difference between the two periods rests in how the instruments were designed and how they were applied.

At the beginning of the 20th century income support for persons and households with an income below the poverty line was brought under the control of the public sector, with implementation being delegated to local governments and financed through taxes. This organisational set-up has basically remained unchanged. However, the first half of the 20th century only saw the development of social security arrangements for wage-earners. These arrangements were implemented with the instrument of regulation, while leaving the organisation and implementation to the cooperation between employers and trade unions. The government used its power to regulate the private sector by making insurance against the financial consequences of a range of risks mandatory. The insurance was provided by a monopolistic insurer operating on a non-profit basis under control of the branch organisations. This meant that the insured person had no free choice and that competition between insurance firms did not exist. Insurance of wage-earners against the costs of medical care was based on the same principle, although implemented per region and not per business branch. The supply of medical care remained as it had always been: a private sector activity, partly on a non-profit base (hospitals), and the scope for consumers to choose their own supplier remained free, in principle.

The second half of the 20th century, but mainly the years between 1950 and 1970, saw the introduction of social security covering the whole population, with equal entitlements for all citizens and financed through income-dependent premiums and taxes. The overarching instrument to safeguard the public interest in the new type of social security was to keep the arrangements fully under government control by making them public sector activities. The provision of insurance by a public monopolist, the collection of mandatory contributions and the distribution of benefits all remained within the public sector. However, the delivery of medical and other types of care, which in the past often had started as private initiatives of caring citizens to provide care for the needy, remained within the private sector.

In the building-up period a differentiated and complex set of instruments had emerged to safeguard the public interest in social security. In this chapter the focus is on what happened with those instruments and their application in the decades of repair and reconstruction of social security. We will use the transformation of Dutch social security as an illutration, though the tendency in the use of the instruments is similar to that of other countries. Since the 1970s safeguarding of the public interest in social security has very much been conceived of as detecting and remedying the public sector failures in the arrangements. Potential public sector failures have been identified in the previous chapter on the economics of the public interest in social security. Section 2 presents a survey of the diverse adjustments made to cope with the new challenges. In section 3 health care is discussed separately because, unlike in other social security sectors, a new arrangement geared to correcting market failures as well as public sector failures has been implemented. Section 4 questions whether there has been a paradigm change, as some authors argue, in the provision of social security. Conclusions are drawn in section 5.

2. THREE DECADES OF REPAIR AND RECONSTRUCTION

An array of adaptations in instruments has been made in the past three decades to mitigate public sector failures in social security arrangements. They have differed in the degree of incisiveness in changing existing entitlements and practices.

2.1. MACRO-ECONOMIC SIGNALS

Overproduction and overconsumption have been identified as major potential public sector failures. The first signals of this date from the 1970s. The problem showed up at the macro-economic level in a strong growth of total taxes and

social insurance contributions; in 1975 calculated to be at a rate of 2% of the national income per year.[1] A publication of the CPB (Netherlands Bureau for Economic Policy Analysis) of 1974 pictured a scenario of a vicious spiral of high public expenditure, requiring higher taxes and social contributions, which in turn would drive up labour costs. The higher costs of labour would lead to job losses and increasing unemployment, which would cause a further increase in the costs of social security and the costs of labour, leading to even more unemployment.[2] The steadily increasing level of unemployment in the 1970s seemed to support the analysis. A worst case scenario was no longer unthinkable, in which an ever increasing share of national income going to social security would actually undermine the economic basis on which the whole social security system rested, resulting in economic and social collapse. The CPB-report was influential and acted as a political eye opener in the Netherlands bringing about the U-turn in the views of the future of the welfare state.

A first political symptom of the change in mood was the decision of the government in 1976 that the sum of taxes and social contributions should not be allowed to increase faster than by 1% of national income per year. For the first time social security was integrated in the macro-economic and budgetary guidelines for government decisions on its public finance. In the 1980s the norm was made more stringent by requiring a stabilization of taxes and premiums as a percentage of national income.[3] The example illustrates how economic analysis can give an indication of unsustainably exuberant social security provisions. Moreover, one could say that economics helped to change political views and to force a shift from consensus on expansion to agreement on restraint and reconstruction aiming at economic sustainability. In retrospect one can view the introduction of the integrated norm as a new supporting macro-economic instrument to signal and contain overproduction and overconsumption in social security.

2.2. LOWER BENEFITS, FEWER ENTITLEMENTS, MORE OBLIGATIONS

To effectuate a sustainable level of social security expenditure a range of adaptations and reforms has been undertaken. As we will see, these have mainly been made in the field of mandatory insurance for wage-earners. The first major cuts were made in the 1980s. In 1985 benefits above the minimum level were lowered from the existing 80% of the former wage to 70% for unemployed

1 Postma 1995.
2 Den Hartog & Tjan 1974.
3 Postma 1995.

persons, the disabled and the absentees due to illness. The 1980s also brought the end of a regulation that linked the level and increase of minimum social benefits in all social security arrangements to the net official minimum wage. Instead of occurring automatically the link would be made at the discretion of the government. The lowering of benefit levels did what it was meant to: bring down total social security expenditure. In some cases it was also effective in bringing down the consumption of the social arrangements, for example the percentage of personnel absent due to illness dropped.[4]

Comparable with lowering monetary benefits was the restriction of entitlements within a social security arrangement and making benefits dependent on more stringent conditions and obligations. Both approaches have been applied in the 1990s and 2000s to unemployment insurance. The period of entitlement to benefits was shortened and made dependent on the previous employment record. The exemption from the requirement to look for work for older unemployed persons was abolished. After a year of unemployment lower paid jobs had to be accepted. Sanctions for not meeting the obligations – reproachable unemployment – were strengthened.

Insofar as lower benefits, fewer entitlements and more obligations do reduce the number of persons in social security arrangements are concerned, the effect comes from the impact on incentives. Users are encouraged to look harder for other more attractive options outside the protection offered by the arrangement. The changes in legislation also reflected an attitude change in society at large. Workers are no longer seen as exclusively victims of circumstances, but are supposed to have some choice left.

2.3. RESTRICTING ELIGIBILITY

To bring the number of users of social security down further the admission to social security arrangements was restricted by making eligibility criteria more stringent. The outstanding example is the mandatory invalidity insurance for wage earners. Since its start in 1967 it had seen three decades of high inflow and low outflow, which resulted in a steady increase in persons receiving payments under the arrangement. In the 1990s it had risen to more than 10% of the working population: by international standards an incredibly high level of incapacity. Lowering of the higher than minimum benefits from 80 to 70% had enacted only little effect on the ample use of the arrangement. A parliamentary inquiry in the early 1990s affirmed the findings of earlier studies that the law had been used on a grand scale to shed off redundant workmen by offering people a

4 Stegeman 2005.

better jobless income arrangement than unemployment insurance could provide. Next to that the organisational set up to implement the law (controlled by representatives of employers and trade unions) was criticized for doing little to stimulate partly handicapped persons to search for a job.[5]

The incisive revision of the Invalidity Insurance Act in 2005 had more effect. It is telling that the name changed into Work and Income (Capacity for Work) Act. The criteria for eligibility became stricter by making a distinction between the really needy with a close to 100% labour handicap and the not so needy who are partly handicapped. The last category has been heavily curtailed in or excluded from benefits. A national agency has been set up and money has been made available to support people actively in their search for a suitable job. The number of persons using the arrangement has decreased and after medical re-examination 60% of those who lost all or part of their benefits had a job.[6]

The demand for benefits from insurance does not only depend on the behaviour of the employee. The incentives for the employer also play a role. Social insurance created the possibility to shift costs of labour from the individual firm to the industry. For the employer it was a cheap option to solve problems at work or redundancy by accepting or even encouraging absence due to illness of the employee. Payment of benefits (100% of the salary in the first year and 70% in the second year) and monitoring was taken over by the public insurer. After two years of absence the patient was eligible for passage to the income arrangement for workers with a labour handicap. For the employer the incentives to prevent illness or to invest in reintegration were evidently weak. In order to mitigate abuse, successive steps have been made in the 1990s and 2000s to shift the wage cost burden of ill employees back to the employer. From 1996 on, the employer had to continue payment during the first year and from 2004 on over the full two years. If the employer wishes to take out private insurance, the payable contribution will depend on his track record regarding staff illness. Some authors have labelled the reform a privatization of the Sickness Benefits Act. That is misleading, since the law is still in existence as a safety net for those who would otherwise be unprotected, such as ill employees working at a firm that goes bankrupt. The changes have been effective in structurally bringing down the percentage of absence due to illness, despite demographic changes that tend to raise the percentage. The structural component of absence fell from about 8.5% of total personnel at the start of the 1980s to 4.5% in the early years of the 2000s.[7]

5 Parliamentary Papers II (Netherlands) 1992/1993, 22 730.
6 Astri 2009.
7 Stegeman, 2005.

Referring to the comments we made on the introduction of mandatory public insurance for wage-dependent workers in our chapter on the public interest from an economics perspective, it should not come as a surprise that we view the so-called privatization of the Sickness Benefits Act as a welcome correction of the public sector failure of government intervention in a domain where economic theory cannot find a public interest according to its own definitions.

2.4. CHANGING PUBLIC SECTOR SUPPLY INCENTIVES

Instead of the incentives for consumers of social security and their employers reform can address the incentives of the public suppliers of social security. One of the causes of the public sector failure of overconsumption and overproduction was the separation between making decisions on eligibility for benefits on the one hand and providing the necessary financial means on the other hand. Under the Dutch Social Assistance Act local governments decided on the eligibility of inhabitants for income support and the national government provided the financial means. After the coming into force of the Act in 1965 the number of people receiving support increased steadily. From the 1980s on, various efforts were made to turn the tide. The level of benefits relative to the net minimum wage was lowered, eligibility criteria as well as obligations were stricter, the monitoring of clients and sanctions for abuse were strengthened. It seemed to work. In the second half of the 1990s and first years of the 2000s the number of persons younger than 65 shows a rather steady decrease. Yet the most incisive change was the reform in the way local expenditure on income support is financed in the new Act on Work and Assistance of 2004. Instead of receiving full compensation from the central government for every euro spent, as it used to be, the local government receives a fixed sum of money. If more is spent on poor relief than the fixed budget the local government has to curtail expenditure on other tasks or raise local taxes. A surplus eases its financial position. Local governments have an incentive to apply eligibility criteria more strictly, to be more active in supporting clients to find work and to intensify the monitoring of clients to detect abuse. Local administrations reacted the way the economic textbook predicts. Econometric studies done by CPB and SEO, taken together, estimate that the new Act reduced the number of persons receiving income support by 6% over its first three years (2004 through 2006).[8] Over a ten year period the number of benefit recipients below the age of 65 decreased from 397,000 in 1998 to 262,000 in September 2008.[9]

8 CPB 2006; SEO 2007.

9 Ministerie van Sociale Zaken en Werkgelegenheid 2008.

A similar story can be told about the reform in the financing of care provided at home for ill and handicapped (usually elderly) persons. Until 2007 the decision on eligibility for subsidized home care and on the type and hours of care to be provided was made by regional committees of experts and officials that had no responsibility for total expenditure. The arrangement was financed out of the national public purse. The home care services were provided by regional non-profit organisations that charged a fixed tariff per hour of provided type of care. Clients could choose between registered suppliers. They paid a personal contribution related to their income, which the provider had to return to the public fund. The year 2007 brought reform. Instead of payment for services provided without a limit on total expenditure, the public funds for home care were distributed among the municipalities as fixed budgets. A budget surplus could be used to finance other tasks of the local government. Under the new financial regime suppliers of home care services had to negotiate, on price per type of care and on total hours per type of care to be provided. This gave municipalities a strong financial motive to be tough: asking much while giving little. In the first year, 2007, the average tariff per hour per type of care was about 10% lower than in 2006. A further striking change was a shift from care provided by personnel with high professional qualifications to lower qualified, less expensive care.[10] Furthermore, the traditional providers reported that labour conditions for their personnel had deteriorated.[11] It also led to complaints that the quality of service had deteriorated dramatically. Against such criticisms the municipalities have taken the stand that they simply, and strictly, apply the eligibility criteria. Their view is that in the past, due to lax application of eligibility criteria and lax monitoring of public subsidies, much of the low quality care, such as cleaning the house, was given by overqualified and therefore overpaid personnel. Municipalities refused to pay more for the service than the strictly necessary costs.

2.5. MITIGATING X-INEFFICIENCY

The changes in public sector incentives discussed in 2.4 were in the first place meant to counter overproduction and overconsumption. However, the overhaul in how the social arrangements are financed has also helped to reduce X-inefficiency. The input of over qualified personnel in home care is an illustration of glaring X-inefficiency. After the financial reform local governments have an incentive to avoid unnecessarily high costs because it gives them opportunities to improve the level of locally delivered services.

10 The care delivered by high qualified personnel was 50 to 80% of total care in 2006, but it had decreased to 5 to 25% in 2007.

11 Van der Velde, Smeets & Van Essen 2007.

Similarly allowing abuse of income support arrangements and inactivity of the bureaucracy in bringing recipients back to work means that public money is wasted on paying benefits. Restricting benefits to those who really need it is as much a reduction of X-inefficiency as a cut in public sector personnel.

2.6. STRENGTHENING COMPETITION BETWEEN SUPPLIERS

In the previous section, we have discussed various repairs and reconstructions in social security arrangements carried out to remedy public sector failures. In this section we discuss one more option, being the participation of private enterprise in the provision of social security, hoping that market incentives will weed out public sector failures, such as lack of choice, X-inefficiency and lack of innovation. In social security the best possibilities for partial privatisation are situated in the production and delivery of care and in insurance.

Table 1 represents four feasible options for organizing a market in the delivery of social security, labelled A, B, C and D. In all options, the service is delivered to eligible users who have free choice of supplier. The public sector finances output and decides on the quantity it will maximally demand and finance per firm. The price (subsidy) per unit of service of a defined minimum quality is either fixed *ex ante* (A and C), or it is determined via competitive bidding (B and D).

Table 1. A semi-market for social security provision

Demand side	**Supply side**	
	Closed market with non-profit firms only	**Open market with free entry, for-profit firms included**
Bureaucracy fixes price and minimum quality; negotiates on quota; finances output	A	C
Bureaucracy fixes minimum quality; negotiates on quota; finances output	B	D

In option A non-profit suppliers compete on a market closed to outsiders for a publicly financed quota (market share). The price to be paid per unit of service is set by the bureaucracy and is not a subject of negotiation. Having negotiated their quota, the firms still have to attract consumers. When the fixed price exceeds the efficient cost of producing output of the required minimum quality, firms are urged to compete on quality. A supplier that stays behind in quality of service will lose customers who have free choice. Consumers will then switch to a more client-oriented supplier. Suppliers with X-inefficient high cost per unit of

output surpassing the fixed price, will run into losses. If they do not improve, such firms end up bankrupt and eclipse from the market. So there are clearly visible indicators of success and failure in performance.

Option B goes a step further than A by letting suppliers also compete on the price to be paid for services of a defined (minimum) quality. The bureaucracy could, for example, organize an auction and select the lowest cost suppliers. Firms are forced to focus their competition on the price of a minimum quality service. Low cost suppliers are identified from the start and high cost suppliers will drop out earlier than in option A.

If the introduction of competition leads to shedding high cost suppliers, it is evidently in the public interest. But will it work? The closed market can easily drift into a silent consensus not to compete on quality of service (in option A) or not to bid in the auction below an agreed upon minimum price (in option B). Collusion between suppliers degenerates the market into a cartel, which performs hardly any better than the former delivery through the bureaucracy. Even if suppliers do not collude, the non-profit firms cannot pay out profits, so there remains an incentive to use the (potential) surplus for X-inefficient expenditures, while they might show little eagerness to innovate with all its risks of not succeeding. All this casts doubts on how effective competition will actually be. In 2009 the Dutch Competition Authority did forbid a merger of regional providers of home care because it found that, next to other objectives, it had the purpose to restrict competition by dividing the regional market.

From an economic point of view, the preferable alternative is the open market with free entry for 'outsiders', including for-profit firms (options C and D). The incumbents have to fear that conspiracy not to compete will tempt potential competitors to enter the market. In option C, effective competition between firms that try to draw in consumers will result in output of a quality appreciated by the consumers. And for-profit firms tend to be more aggressive in trying out innovation that reduces costs as well as innovation that raises quality. In option D, suppliers have to keep costs per unit of output as low as possible to get a quota. Cost-reducing innovation of for-profit firms forces non-profit firms to follow.

Recent developments in home care in the Netherlands offer an illustration. Over the past decades home care became increasingly financed through the public sector by way of mandatory social insurance (the Exceptional Medical Expenses Act). However, the delivery of home care remained in the hands of non-profit organizations. A semi-market similar to option A in table 1. In 2007 the government intervened with a twofold change. The local government was made responsible for the distribution as well as for financing local home care. And the market for subsidized home care was opened for so-called commercial suppliers.

The established regional non-profit suppliers now had to compete on price and quality with for profit firms. The reform very much resembles the passage from option A to D in table 1. The new financing system made local governments tough negotiators in their bargaining with suppliers who did not want to lose clients to competitors. As we mentioned before, the average tariff per hour per type of care was about 10% lower in the first year than in the year before the start of the new system. The second striking change was the shift to the more austere type of services.[12] The majority of traditional non-profit suppliers failed to adjust organization and personnel in due time. The lower tariffs and the change in the composition of demand caused such a fall in revenue that its costs were no longer covered. Organizations had to eat their capital. The 10% price reduction and the shift to more austere services are indications of forced cuts in the X-inefficiency that prevailed under the old arrangement due to lack of competition. In the next year 2008 performance was better; with 25% of the organizations making a loss.

The opening of the home care market for competitors has also triggered entrepreneurship and innovation. Against the trend of enlarging the organizational scale a former manager in home care started his own business in 2006 with the building up a network of small-scale local and regional teams of about 10 nursing professionals with a mix of higher and intermediate vocal training. Team members are paid a wage according to the Collective Labour Contract for the home care sector. The organizer and employer of the team members conclude the contracts and delegate the contracted work to the teams that organize their own work.[13] This is a form of self-management without a complicated monitoring mechanism. It is the opposite of the strategy of the large organisations that have increasingly centralized the planning of work and split up the tasks per client in their smallest elements with minutes set per element. Such bureaucratization has led to an overhead cost of on average 30% of total cost and for nursing personnel it has brought loss of work satisfaction. In contrast the aforementioned network of small teams has an overhead of 8% and where nursing personnel see the opportunity they leave the bureaucratic organisations to join a local/regional team. In a comparison of 308 Dutch organizations for home care the network got the highest score on client satisfaction.[14] The case is a vivid illustration of how opening the market for new competitors attracts entrepreneurs who try out new combinations in a sector beset by overconsumption (in quality), X-inefficiency and counter-productive 'innovation'.

12 Van der Velde Smeets & Van Essen 2007.
13 De Veer et al. 2008; Wammes 2009.
14 De Veer et al. 2009.

Competition in an open market makes suppliers more pro-active. In the end, badly managed firms, with sustained high cost and/or poor quality of service, will not survive. Although such eclipses are dramatic events, one should not overlook the fact that they are an inseparable part of recovering from X-inefficiency. Safeguarding the public interest in social security should not be confused with safeguarding the special interest of maintaining the *status quo.*

Partial privatisation and creation of semi-markets in the Netherlands looks at times like an Echternach procession, one might say: three steps forward followed by two steps back. Around the year 2000 the task of reintegrating unemployed persons was taken away from the public sector organisations that register unemployed persons and pay benefits. All reintegration activities in support of unemployed people's job search had to be outsourced to reintegration firms. Tenders had the form of either no-cure-no-pay contracts or no-cure-less-pay contracts. A few years later the reform was partially turned back. From 2006 on, the public sector organisations were again allowed to have in-house reintegration and were free to decide whether to contract reintegration firms or not.[15] The steps back seem to have been inspired by suspicions that contracted firms were selective, making efforts to assist only those unemployed person who were relatively east to place. An *ex post* evaluation has revealed that such 'cream-skimming' was only manifest in no-cure-no-pay contracts for a relatively small group of unemployed persons with a labour handicap. More of a worry was that the labour contracts of the clients were often for a short period only.[16] One can hope that within a few years' studies will appear comparing the costs and effectiveness of the public internal trajectory with the market trajectory. Learning by doing and comparing results seems to us an appropriate approach to the issue.

2.7. INCREASING CHOICE FOR CONSUMERS

In a normal market, the consumer can choose between varieties of a product, differing in quality and price. The semi-markets discussed in the previous subsection do not offer that choice. The quality and price of social security services are basically determined by the bureaucracy and tend to a uniform level, either with price and quality somewhat above the minimum (option C) or at the defined minimum quality at the lowest price (option D).

To provide for competition in a market with real choice for consumers, a more radical reform is needed. Public funds have to be channelled directly to eligible

15 Koning & Heinrich 2009.
16 Koning & Heinrich 2009.

consumers of the social security services by giving them their own budget. Consumers order the type of service they want. Their account is charged with the bill and the expenditure reduces the remaining personal budget. The consumer can exceed his budget, but he or she has to finance the excess costs him- or herself. Suppliers are forced to focus on what the user of the service demands. When consumers differ in needs and preferences, firms have an interest in supplying them with differentiated services, differing in costs and accordingly in price. The instrument eliminates the public sector failure of lack of choice for users. Competition between suppliers limits X-inefficiency.

A Dutch example is the introduction, a few years ago, of a personal fixed budget for eligible sick and incapacitated persons. The voucher scheme enables them to make their own choice in buying care for certain handicaps from competing suppliers of home care. It is also under development in care for persons with specific handicaps. Alongside this personal budgets, or 'rucksacks', are also available for long term unemployed persons to finance coaching in job searching and training to raise capabilities. In creating the latter facility, the hope was that the new arrangement would also stimulate innovation in the type of options offered on the market for job training. One of the arguments against voucher schemes is that participants might lack the information on what is offered on the market and what would suit their needs best. To counter the problem, the public authority can draw up a list of recognized providers and stipulate that budgets can only be expended on their services. The downside is that such certification throws up barriers for entry of potential competitors.[17] One can conclude that a government introducing 'rucksack' arrangements should also consider it as its task to provide reliable and relevant information on available supply.

3. CONSTRUCTION AND RECONSTRUCTION IN HEALTH CARE

We have defined the 1970s as the decade of transition from the period of building up social security to the time of its consolidation asking for repair and reconstruction. This picture is, as all schemes are, a simplification. As recently as 2006, an impressive new wing has been added to the social security building: the Care Insurance Act that covers the costs of health care of all Dutch citizens, wage-earners, persons dependent on benefits as well as the self-employed. Instead of a British-type national health care service, the structure is mandatory insurance for each citizen against the costs of a standard package of health care. Citizens have free choice between private firms supplying insurance. Under the

17 Groot & Maassens van den Brink 2009.

old regime such choice was lacking for wage-earners with mandatory insurance and non-wage-earners not dependent on benefits, could remain uninsured. Insurers are forbidden to refuse customers or to differentiate contributions on the basis of health status or age. Through a mandatory scheme of money transfer, insurance companies with a share of old and chronically ill clients above the average receive compensatory payments from insurers with a lower percentage of clients in the high medical cost category. Insurers compete on price (the insurance contribution) and on quality of service. In the first years of the Act competition between insurers has been effective in preventing insurance contributions from rising too fast.

Insured persons pay their contributions to insurers. They also pay a special care insurance tax, which is proportional to personal income (presently about 5%) and which is capped. Tax revenue is partly redistributed in support of insured persons with low income. The attractive feature of the scheme is that it combines free choice of insurer for consumers, similar to what they would have had in a market for private insurance, with the financial capability to afford insurance, comparable with the former mandatory insurance for wage-earners. In our chapter on the public interest of social security, the thesis was developed that the vertical distribution of lifelong benefits of and mandatory contributions to welfare state arrangements in the Netherlands reflect a considerable amount of caring (or: solidarity) of citizens with higher incomes with fellow citizens with lower incomes. If one accepts that thesis, one can interpret the vertical redistribution through the care insurance tax as an instrument that internalizes caring externalities in the domain of health care, correcting the market failure that would have existed otherwise. With regard to its social and political acceptation it is of interest that the redistributive tax did not come in a flash, but had gradually evolved over a long period.

The public interest comprises more than insurance in order to assure citizens equal admittance to health care. The quality and price of health care itself are also at stake. The objective of recent government policy is to develop and strengthen the market for health care as well as the market for health care insurance, in the expectation that competition will lead to better care at lower costs. Up to now the insurance market has lived up to the desired curbing of ever-increasing insurance contributions. How the market for health care provision is faring is less clear. The supply of health care has remained a private sector activity, mainly by non-profit firms, thus reflecting the sector's early development as private charity. In the second half of the 20th century the government became increasingly involved, starting with the instrument of subsidies for hospitals and infirmaries, for instance, to keep health care affordable. It was followed by regulatory intervention, such as price regulation

and the control of investments in health care, mainly geared to keeping rising costs under control. The government's blueprint for the future is to reduce price regulation and other direct interventions. Insurance companies, representing their clients' interests, will negotiate with providers of health care on the price (of a steadily growing list) of cures for which no regulated tariff exists. At the moment of writing this chapter, it is too early to assess the results. To be able to make such an assessment, three important issues have to be cleared up in the near future.

First, to make informed decisions, insurers need detailed and reliable information on the quality of care provided by individual hospitals, for instance. Progress has been made in the past years, although there is still a long way to go. The hope is that with gradually increasing transparency on the quality of care, the medical performance of hospitals will become more and more an issue in the negotiations. In economic terminology: market demand will then exert pressure on suppliers to weed out quality-impairing X-inefficiencies.

Second, the market, where insurers and health care providers negotiate on price and quality, evidently has the structure of an oligopoly at both the demand and the supply side. That makes it hard if not impossible to predict what the final outcome will be.

Third, in 2009 influential political representatives are backing away from earlier decisions and have started to contest the acceptability of for-profit firms in health care, and even participation of private for-profit capital in non-profit firms. That relapse is not in the public interest. On the contrary, it is bad for variety of choice for consumers, bad for competitive pressure to reduce X-inefficiency, and bad for innovation in health care.

Health care offers a most interesting case. It combines a further build-up and extension of social security, rooted in notions of solidarity, as if we were still in the 1960s. At the same time it is a work of reconstruction, trying to cut away a proliferation of public interventions and restore the function of markets in health care.

4. A PARADIGM CHANGE?

In the literature the question is raised, for instance by Asscher-Vonk (2005), whether there has been a 'paradigm change': a transition from providing security and income protection to making social security subservient to the interests of the economy, such as a smooth functioning of the labour market. Although it is

not mentioned, the author must have focussed on social insurance for wage-earners. As has been indicated in this chapter incisive changes to bring down expenditure have been made in mandatory insurance against the risk of loss of wage income due to unemployment, illness and invalidity. In the domain of social security it has only been paralleled by the reforms culminating in the transition from the General Assistance Act to the Work and Assistance Act. The impact of all structural changes to bring down expenditure on income support is reflected in a decrease in social security expenditures as a percentage of gross domestic product from 19% in 1980 to a (predicted) 13% in 2010. The 1990s have been the decade with the harshest cuts. However, to get a complete picture one should also have a look at care. There the development has been in the opposite direction. The major event has been the introduction of mandatory insurance covering the cost of medical care for all citizens. Next to that the changes in other care legislation have been geared in the first place to improving efficiency and not to stop the growth in care. As a result the expenditures on social care have been rising steadily from 5% of the gross domestic product in 1980 to a (predicted) 10% in 2010.[18] Taking the figures together, collective expenditure for social security and care as a percentage of gross domestic product was 24% in 1980 and the prognosis for 2010 is 23%. In a society where the average income per person is roughly 50% higher than thirty years ago, the percentage spent on social security and care is only a fraction lower.

The transition that actually has occurred is the shift from social security exclusively provided to wage-dependent citizens to social security and care for all citizens. One could call it a paradigm change, but in an interpretation very different from Asscher-Vonk. From the argumentation in our chapter on the public interest of social security it follows that the government has been withdrawing from a domain where it hardly had a task since it is obscure what the market failure in providing insurance is. Economic theory dictates that when there is no market failure to be corrected, there is no public interest asking for governmental action. However, the government has extended its interventions in the domain of care, where shortcomings in private efforts to organize solidarity create a kind of market failure. Over the past thirty years the government has continued its efforts to fill the gaps left due to market failure and simultaneously repair public sector failures in the provision of care. So from an economic point of view, the government has been retracting to its core business, which is, serving the public interest.

If there are reasons to worry it is about the far from imaginary threat that in the domain of care the government will overshoot the mark, as it did in the 1960s and 1970s with regard to social security arrangements providing income support.

18 Source: CPB, *Tijdreeks overheidsfinanciën*.

On its introduction, the Exceptional Medical Costs Act was meant to cover medical costs that were unexpected and extremely high, such as long stay residence in a hospital for the mentally ill. In the course of time its coverage has been extended to include care that does not come unexpectedly or that has costs which the large majority of citizens can pay out of current income.[19] If the trend of the past decades is not deflected, expenditure on social care as a percentage of gross domestic product will creep up further during the coming decades.[20] Since care expenditure is financed by social premiums, care tends to drive up labour costs. In a worst case scenario, the economic troubles of the 1970s (discussed in section 2.1) might reappear on stage. The aftermath of that period should call to mind that what at first sight looks like a conflict between social and economic interests is actually a symbiotic relationship. Social security benefits and services require resources that are withdrawn from other uses. A broad and solid system of social security is only feasible in a state able to keep economic problems under control and able to sustain economic growth. It cannot survive in a failing economy. After the emergence of economic weaknesses in the 1970s and a seemingly uncontrollable increase in social security expenditure, decades of repair and reconstruction have followed to make social security sustainable. It has been a sobering lesson, not to be forgotten.

5. CONCLUSION

In our chapter on the public interest of social security we have argued that in building up social security, governments had a broader conception of the public interest than the criteria of economic science prescribe. In the Netherlands, it resulted in a public sector provision of certainty of income and care on a scale that went further than the correction of market failure. However, we have also signalled that government policy in the past three decades has been shifting. The political view of what the public interest in social security is has come more in line with the economic demarcation. Social security arrangements in the domain of social insurance for wage-earners, which cannot be justified as a correction of market failure, have been slimmed down. Nevertheless, social security has been extended to health care, where we had in fact identified a market failure in the organization of solidarity and thus a genuine public interest requiring involvement of the public sector. Social care financed out of the public purse has even been proliferating to such an extent that it is overshooting the mark.

Next to reorientation of social expenditure the government has introduced reforms that will reduce X-inefficiency and may stimulate innovation. An

19 Groot 2009.
20 De Kam 2009.

example is competition in the markets where social security services are delivered to clients by allowing commercial suppliers free access to the market. Personal budgets or vouchers that give consumers more choice, both of supplier and of type and quality of service, have been given a try.

In short, the evidence that we have collected does not support the hypothesis that the government has let down the public interest in social security. On the contrary, by introducing mandatory care insurance and through adjustments to suppress X-inefficiency in the provision of care, the government has focused on what it had to do: safeguarding the public interest in social security and trying to make it sustainable. What remains is the question whether the repairs have been sufficient to make social security sustainable for the next decades. Time will tell.

INSTRUMENTALISATION OF PUBLIC VALUES IN SOCIAL SECURITY: A PUBLIC ADMINISTRATION PERSPECTIVE

Ko de Ridder

1. INTRODUCTION

When we try to get to the core of what the 'instrumentalisation of public values'[1] might be, we are confronted with three general questions:

- What are public values?
- What is instrumentalisation or safeguarding?
- What different ways of safeguarding public values are there?

The aim of this contribution is, to attempt to answer these questions from a public administration perspective – first in a general way and then applied to the policy field of social security.

Traditionally, many public administration scholars considered the guarding of public values one of the core themes of the discipline. According to this view, both the structuring and the operation of organizations in the public sector should be geared primarily to upholding public values such as equity, fairness and professional service. Public administration as an academic discipline should study the ways and means by which public administration practitioners could accomplish these aspirations.[2] In the whirlwind of New Public Management (NPM) that has swept the field over the past 25 years, this focus seems somewhat lost, be it in different degrees. The centre subject of NPM is another public value: the efficiency of the public sector and how to make use of market type mechanisms to enhance public efficiency.[3] In the wake of NPM, many academic

1 In this chapter the term 'public value' is used, referring to the social science approach introduced by Plantinga's contribution in this volume (see p. 51).
2 Marini 1971.
3 Lane 2000.

institutions changed their name from 'public administration' to 'public policy' or 'public management'. Accordingly, the mission of academic scholarship partially shifted towards developing tools for a more market-oriented approach of public policy. Still, a substantial part of public administration research was aimed at a critical evaluation of NPM devices and accomplishments.[4] The NPM revolution did not leave the policy sphere of social security untouched. On the contrary, some of the most striking experiments with market type mechanisms have been implemented in precisely this area. Privatization, outsourcing and voucher systems are a few of the policy instruments that found widespread application in the social security and social care of most industrialized countries. As scholarship followed suit, a host of papers on topics such as voucher systems, contractual relations and cooperative governance, all in social security, filled the public administration journals.

It is important to note that the NPM-wave not only implied a modification of the tools of choice for public governance, but also an alteration of the underlying values, or at least a shift in the emphasis on different public values. This in turn has led to a new reflection of what constitutes core public values that public administration is to uphold. We find this for instance in the work of Bozeman (2007), but also in the WRR-study (2000) on 'Safeguarding public values'. The question 'what are public values' is extensively dealt with elsewhere in this volume. Suffice it to remark here that from a theoretical perspective, the concept remains elusive, all attempts at clarification and operationalisation notwithstanding. At the same time, determining public values that require public safeguarding is the bread and butter of politics in modern states. Capturing and categorizing public values from such a practical point of view is routinely done. A simple catalogue in a public administration textbook lists the following:[5]

- provision of collective goods and quasi collective goods;
- maintaining market infrastructure;
- addressing external effects of human activity;
- provision of merit goods and de-merit goods;
- compensating for unequal distribution.

Especially the last one often appears as the value base for social security policies and arrangements. More specific public values that are commonly considered essential for the sustainability of social security are solidarity, efficiency and social and economic participation.[6] This small inventory seems as good a starting point as any to discuss in more depth the idea of safeguarding public values in social security.

4 Pollit & Bouckeart 2004.
5 Bovens, Pellikaan & Trappenburg 2005.
6 See Plantinga in this volume.

2. SAFEGUARDING

We now come to the question: what is the 'safeguarding of public values'? Before we enter into a discussion of safeguarding itself, it is worthwhile to make some general remarks concerning 'social order'. In the social sciences, it is a commonly accepted model that social order comes in three distinct flavours: markets, hierarchies and communities.[7] Each has its own types of interaction and of social control; the Invisible Hand of the Market, the Harsh Hand of Hierarchy and the Helping Hand of the Community. Some toll the virtues of the market and its capacity to create order without law or hierarchy.[8] Others emphasize the indispensable and vital nature of community order, trust and social capital and denounce the crowding out of structures such as a civil society by markets or hierarchies.[9] Yet most social scientists would agree that a vital society will need a well balanced combination of all three attributes for generating social order.[10]

There is a distinctive difference between markets and communities on the one hand and hierarchy on the other hand. Although it does not necessarily have to be that way, unlike the other two forms of social order, hierarchies are usually intentionally designed, created for a purpose. While the social ordering of markets and communities can in some sense be considered 'invisible', that of hierarchies is not. All its ordering devices such as rules, instructions, control, sanctioning are man-made and observable. In markets and communities we see the social regularity that many individual choices add up to collective phenomena that are not or not necessarily intended by any of those individuals making those choices. There is a gap between individual choices and collective outcomes that constitutes the proverbial invisible hand coined by Adam Smith. Hierarchy conversely is an intended result of individual or collective choice. Hierarchy then stands for intentional intervention in the social processes of markets and communities.

With this in mind, we return to the concept of safeguarding. By the safeguarding of public values is generally meant: any intervention in societal affairs by a governmental body or public agency. A few particulars of this definition should be noted.

First of all, safeguarding is qualified as an activity, an intervention. One approach to identifying public values is to consider anything a public value if it is dealt

7 Ross 1901, Ellis 1971, Goudsblom 1974.
8 Driscoll & Hoskin 2006.
9 Putnam 1995.
10 Durand 1992.

with as a public value. In other words, because the body politic safeguards it, it qualifies as a public value. Such a concept of public values implies that public intervention and public values are congruent. When there is public intervention, there are public values and vice versa. This concept is flawed inasmuch as that there are public values that can endure without government intervention. The social order and its derivatives that are generated by markets and communities are indispensible and therefore in many ways collective interests. Generally speaking, the common good is brought about quite often without intentional social engineering. However, there are collective outcomes of individual choice that are not in the common interest, but on the contrary constitute a threat to the common good. One class of such outcomes produced by the invisible hands of the market or the community is what economists call 'external effects' – with environmental pollution as a prime example. The 'tragedy of the commons' is the parable that illustrates how collective outcomes can be detrimental to the best interests of every individual involved.[11] These and other threats and missed opportunities constitute reasons for government intervention, for the activity that we call 'safeguarding public values'.

Secondly, safeguarding is an activity of public bodies, governmental in one way or another. Again this follows from the previous assumption that much of the common good is generated by the 'invisible hand' of markets and communities. Active visible intervention requires accruing power in a collective actor: safeguarding public values starts with 'transferring individual rights of control' to a public authority.[12] The one distinguishing feature of a government is its monopoly on legitimate force. By compelling individual actors to comply with collective choices, negative or substandard outcomes of markets and communities can presumably be thwarted or corrected. Yet the deployment of public authority has its own drawbacks. Time lags, inefficiency and ineffectiveness are but some of the criticisms levelled at many government interventions in society. While the flipside of market blessings is market failures, the reverse of government intervention is government failure.[13] Thus safeguarding of public values requires careful balancing of interventionist activities with societal capacity for maintenance, recuperation and improvement.[14]

Thirdly, there is a wide variety of public interventions, of ways to use 'collective rights of control'. For instance, a seemingly minimalist involvement of collective

11 Hardin 1968.
12 Coleman 1990.
13 Winston 2006.
14 There is a similarity between the choice for the optimal policy mix and the make-or-buy choice firms are confronted with. When buying (parts for instance) a firm makes use of market forces to reap efficiency benefits. When making, the firm uses hierarchy to reap the benefits of enhanced control (Coase 1937).

authority in societal affairs brings about and sustains a system of civil law, the infrastructure for contractual exchange. At the other end of the spectrum of public interventions is the production of collective goods or services by the public authority itself. Again, the choice of collective action instruments for safeguarding a specific public value is a balancing act that involves a lot of trial and error. Beyond that, the optimal public policy mix may change overtime, due to changing contingent factors, such as technology. More generally, in modern society there is hardly any market activity that is not affected in some way by collective intervention aimed at safeguarding one or more public values.[15]

The concept of 'safeguarding public values' thus implies looking at government policy from a specific angle. The concept takes into account that modern society has numerous ways to preserve and reinvigorate social order apart from and beyond what governments can contribute. Yet modern society has numerous ways of disrupting social order as well – witness the 2008 credit crisis. Government policy from the perspective of safeguarding public values appears as the art of finding a precarious balance between preventing societal disruption and stimulating societal preservation of social order. Public value failure[16] can, within this framework, be thought of as a failure of a society at large to preserve a desired social order and safeguard corresponding public values. A rearrangement of public and private involvement in that area is then called for.

3. VARIATIONS IN SAFEGUARDING

3.1. VARIATIONS IN INTERVENTION

Public values come in different categories and one may assume that each type of public value requires its own mix of public interventions, as a complement to societal (market and community) ways of social ordering. The underlying logic is that by combining several ordering principles, weak aspects of one principle can be compensated by mechanisms of the other ordering principles.[17] However, finding the right mix is not without problems.[18] One complication is that usually a number of different public values will have to be preserved at the same time. An instrument that effectively safeguards one public value may very well be detrimental to another one that is equally important. The market might promote efficiency and effectiveness of service delivery at the expense of public values

15 Bozeman 1987.
16 Public value failure is the concept developed by Bozeman 2007. It is discussed extensively in the contribution of Plantinga to this volume.
17 Centraal Planbureau 1997; Lijesen, Kolkman & Halbesma 2007.
18 Kirkpatrick 1999.

such as equality of rights and legal certainty, while government regulation might safeguard public values yet have damaging effects on efficiency. Thus, when searching for the right policy mix there are inevitably tradeoffs between different public values. Furthermore, safeguarding is costly, and the costs of an extensive set of safeguarding instruments may outweigh its benefits.[19] Moreover, the optimal mix of interventions may change over time, due to changing circumstances. Finding the optimum is a recurring societal experiment, and easy solutions are not available, all the convictions of social theorists notwithstanding.[20]

One such experiment is to be found in the sector of infrastructure: utilities such as railways, electricity, gas, water, and telephone. Typically these utilities were for a long time conceived to be natural monopolies and therefore collective goods. The required infrastructure prohibited a competitive way of providing services. On these grounds, in Europe the public policy of choice for safeguarding public values of uninterrupted, relatively efficient and cost effective service was government self production by public companies. In the United States, many of these utilities were run by private firms (such as the monopoly Bell Telephone company) while safeguarding of public values was achieved by heavy regulation.

New technology, especially IT, created a host of new ways to use one infrastructure system by a number of competing firms. Theoretically this opened up the opportunity for enhancing the efficiency and cost effectiveness by privatization: transferring the provision of these services to the social order of the market. Yet this gives rise to the question of how to preserve other public values related to these utilities, such as uninterrupted service, affordability and safety. Government policies aimed at creating safeguards for these public values with privatized utilities again may use a mix of strategies that relate to the three primary forms of social order.[21] Government may use hierarchy, imposing and enforcing rules concerning the public values it wants to protect. Government may also attempt to enhance market mechanisms and facilitate consumer choice, including exit options, by enhancing transparency of procedure and performance of private firms. Finally, government may try to harness community forces, and approach the collective of utility firms as a civil society and create incentives for self-regulation, peer assessment and control within the sector.

19 Mitnick, 1981.

20 The idea that safeguarding public values is a a matter of permanent learning by trial error is put forward, too by Stam, Stellinga & De Vries 2010.

21 De Bruijn & Dicke 2006.

3.2. VARIATIONS IN LEVELS OF SAFEGUARDING

A second approach for gaining more insight in the process of policy intervention makes use of a social system model of society and its myriad subdivisions.[22] A systems approach emphasizes a few specific features of societies and subunits of a society. One such feature is that a system operates in interaction with an environment. To model that interaction, a system is considered to have an input and an output. Processes within the system are labelled throughput. Typically, outputs generate reactions in the environment that are fed back as new input into the system. This feedback loop is thought to be the most important single feature of the relation between a system and its environment.

A policy system (as a subsystem of a society) can be conceived of as the whole of institutions and legal arrangements that develops, implements and sustains a certain policy complex within a society. From the perspective of the policy system, society appears as its environment. Policy systems differ from one to another, depending on the public values, the support and the resources that go into the system (its input), on the dynamics of those values within the system (its throughput) and depending on the way the system is designed to provide for outputs, that is the implementation of policy. The safeguarding of public values may be located at each of these three levels of the policy system.

At the input level, ample support and resources need to be secured in order to make and keep the policy system viable. Political institutions that convert societal interests and demands into governmental policies and actions typically are the linking pin here between society and the policy system. If this part of the system is not functioning well, public value failure results.[23] Secondly, safeguards at the throughput level are inherent in the institutional design of the policy system itself. Ideally the design is such that the policy system is fully capable of developing and implementing all those policies that are required for upholding and safeguarding its public values. Design features will typically consist of a choice of market-type, community and hierarchical tools. A social health system, for instance, may be designed to produce a certain level of physical wellbeing in society under conditions of equal access and equal distribution. The policy system mix could include private insurance firms, non-profit health providers and public regulators. Thirdly, at the output level of a policy system, chosen policies are implemented. At this level the design of the interface between the system and the citizens is a core issue. Both the values intrinsic to the policy and the accompanying values of for instance citizens' rights have to be safeguarded here. Depending on the institutional mix in place, clients could be

22 Luhmann 1995.
23 See Plantinga in this volume.

confronted with street level bureaucrats, private contractors or non-profit professionals – or all three. The ways and means of safeguarding public values will vary accordingly.

3.3. VARIATIONS IN THE TOOLS OF GOVERNMENT

Traditionally, government policy interventions are hierarchical by nature. Making, applying and enforcing rules is the core business of government agencies. Even when enlisting market forces or community action, the tools for government intervention are regulatory by nature. However, much of the present day literature denounces the hierarchy of command and control regulation as old fashioned, ineffective and inefficient.[24] Instead regulators are experimenting with forms of regulation that allow for more flexible and tailor made solutions to threats to public values. Typically there are three general deviations from the traditional command and control kind of regulation to be seen.

The first deviation is found within the conception of regulation. While the traditional view requires *binding rules*, to be made by a democratically controlled legislature, present day approaches stretch the involvement of stakeholders in the rule making process. Responsive regulation is one concept for such an approach.[25] Self-regulation and other forms of soft law, sometimes backed up by a threat of public regulation, is another form.

The second deviation is found within the application and enforcement of rules. Where the traditional view of regulation stretches the importance of equal treatment, latter day approaches emphasize case by case problem solving.[26] Not adherence to the rule as such, but tackling the problem that the rule is supposed to cover should be the essence of regulatory and supervisory activities. Thus we may observe experiments with 'interactive implementation', 'compliance assistance', 'testing best practices' and 'bench mark assessments'. It is quite apparent that the old paradigm of legality and equal treatment under the law is in jeopardy here.

A third deviation is aimed at enhancing market mechanisms. Divergences from a norm or rule are not enforced but exposed. Naming and shaming, transparency and other public exposure techniques are used as incentives for customers to choose those providers that adhere best to public values. Research shows however, that public opinion may well differ from the opinion of the regulators

24 Solomon 2008.
25 Ayres & Braithwaite 1995.
26 Sparrow 2000.

on what constitutes best value for money, and that consumer exit is not necessarily an effective sanction to promote the desired norm compliance.[27]

Even though these new approaches are presented as 'the state of the art' in safeguarding public values, it remains to be seen whether they constitute more than a gradual shift. Constraints to be found in time honoured legal principles governing public intervention, such as legality, equality and the prohibition of arbitrariness, could limit their practical value. Beyond that, some features labelled as new inventions, such as interactive rule making, have been practiced for a long time in some jurisdictions. It might very well be that we are witnessing a modification in approach and attitude, more than a shift in regulatory paradigms.

4. SAFEGUARDING PUBLIC VALUES IN SOCIAL SECURITY

Government involvement in social security, or more generally, in safeguarding income security under dire circumstances, has a long tradition. Income security as such can be considered a public value in the modern welfare state. It falls in the general public value category of 'compensating for unequal distribution'. History has shown that neither the market nor civil society are capable of producing sufficient safeguards against loss of income generating capacity, due to impairing accidents, illness, old age and such on the one hand, and loss of income due to lack of jobs on the other. For instance, experience taught time and again that safeguards against 'occupational health and safety' could not be contracted for in normal labour contracts. Therefore in most industrialized nations some kind of legislation to correct this market failure can be found. Over time, such threats to income security have been met with collective arrangements. In fact many industrialized nations have a complicated system of welfare provision in which all kinds of risks to a larger or lesser degree are covered. Still, there is a large variation from country to country as to the range of risks and the strength of protection that public arrangements offer. Or in the terms of our previous discussion, there is a large number of ways in which public values in social security are being upheld. Just like each policy system, a welfare system can be conceived of as the whole of institutions and legal arrangements that provides social welfare in a society.[28] Welfare systems differ from one to another, depending on the public values that go into system (its input), on the dynamics of those values within the system (its throughput) and on the way the system is designed to provide for outputs and implement policy.

27 Janssens 2005.
28 Korpi 2001.

There is not just variation across nations, but also over time. Over the years, a shift in emphasis in institutional arrangements of social welfare systems can be observed, a shift first from community to state, and then to market mechanisms.[29] The first welfare arrangements in the 19th century relied on private initiative, with an auxiliary regulatory role for the state. The churches looked after the poor and the employers and employees developed funds to cover employment related risks. State regulation was not to interfere with these private initiatives. During the 20th century, governments increased their role in the provision of welfare, creating agencies that supply coverage for a host of income security risks, while involvement of community-based associations dwindled. As from the end of the 20th century, there is a tendency to apply market type mechanism and engage private firms in the institutional arrangements of welfare policy systems.[30] Underlying these recent shifts toward the market is the same expectation that has driven the NPM wave as a whole: the belief that it will increase the efficiency of the system and therewith decrease public spending.[31] State agencies are withdrawn from direct provision of welfare services and state intervention is gradually reduced to regulation. For some, these developments are a reason to qualify present welfare systems as 'regulatory welfare state'.[32]

We will now take a closer look at some essential issues concerning the safeguarding of public values in such a more privatized social welfare system. We do so by applying the social systems modelling developed above. We assume that, like any policy system, social welfare systems display input, output and throughput levels, and that each level provides a leverage point for safeguarding the public values intrinsic to social welfare.

5. SAFEGUARDING AT THE INPUT SIDE

On the input side of the system, we find three distinct policy dilemmas that are inherent to all welfare systems:[33] a) universality vs. selectivity; b) redistribution, especially between generations; c) individual responsibility vs. collective responsibility. Welfare policies that are *selective* target specific groups, primarily the poor and needy, while *universal* policies cover a much broader range of risks and will also encompass the middle class. The degree of *redistribution* that a welfare system is allowed to generate is a second value choice. A third one is the

29 Huber, Maucher & Sak 2008.
30 Van Oorschot 1998.
31 Walsh 1995; Bredgaard & Larsen 2007.
32 Leisering 2003.
33 Van der Veen 2008.

degree of collective responsibility and the trade off with individual responsibility that a welfare system may engender.

At first glance, all three dilemmas seem to represent pretty straightforward public value alternatives. Safeguarding those values would then imply designing a welfare system that is capable of transforming these values into practical policies and implementing those policies in the realization of entitlements. However, the safeguarding of public welfare values turns out to be more complicated than that. Public values themselves, that is public support for specific policy choices, are influenced by design parameters of the welfare system. Beyond a certain threshold, too much selectivity erodes support, launching a vicious circle of increasing selectivity and decreasing support. 'The more we target benefits at the poor and the more concerned we are with creating equality via equal public transfers to all, the less likely we are to reduce poverty and inequality.'[34] Just the same, there are self-enforcing feedback effects the other way around: universal systems tend to buttress support for welfare. More so, it has been shown that a universal system enhances social capital and participation of a civil society in the common good.[35] Bowling alone is more likely in societies with a selective system than in societies with a universal system. Similar positive feedback effects have been observed for public values concerning redistribution and collective responsibility. Organized solidarity spawns a sense of solidarity while collective responsibility may enhance individual responsibility.

Yet negative feedback effects may occur as well. Thus an overly universal system can erode individual and community responsibility. If the government takes care of everything, why should citizens take care of anything? Avoiding this type of moral hazard is a necessary system requirement. Instruments such as residual risk for citizens and giving citizens choice in selecting service providers (through a voucher scheme for instance) are some of the latter day attempts to remedy such deficiencies.[36]

More generally, in order to sustain a social welfare system, welfare policies should aim at strengthening positive feedbacks and limiting negative feedbacks. Solidarity and social trust are precarious yet indispensable resources for the maintenance of social welfare systems. Both can be eroded by negative feedbacks like a sense of wastefulness or signs of inequity in the system. In this sense, the safeguarding of public values in social security starts with the choice of the goal parameters of the policy system.

34 Korpi & Palme 1998.
35 Salamon, Sokolowski & List 2003.
36 Heinrich & Choi 2007.

6. SAFEGUARDING THROUGH SYSTEM DESIGN

Next, safeguards for the public values of social welfare are to be found in the throughput of the welfare system, that is: in the allocation of tasks and powers to different public and private actors and in the devices for coordination and control.

The overall design of social welfare systems may include direct provision by the state (in the Netherlands: administration of social assistance by municipalities and of unemployment benefits and disability benefits by the state agency UWV); provision by corporatist arrangement (employers and employees) under a legislative umbrella; provision by private collectives under a legislative and supervisory umbrella (pension funds), provision by private insurance firms under a legislative and supervisory umbrella (life insurance companies).

As is often the case, in the field of social security too, there is some competition or trade off between several public values. Key public values, apart from income security itself, are those of 'social and economic participation' and 'efficient provision'. The prime order of the market may provide for the latter value. For instance, private insurance companies are thought to operate relatively efficiently. Yet the value of income security might not be fully realized: firms in the market are under the incentive to avoid bad risks (adverse selection), and to take more entrepreneurial risks than are compatible with long term social security ('firms should be able to fail, but life insurance firms are not allowed to fail'). For the policy mix there is the choice between accepting the greater risk of the market in exchange for more efficiency, or building in additional state safeguards to promote equal access (prohibit adverse selection for instance) or to prevent insurance company insolvency.

The value of 'social and economic participation' may be jeopardized by income security schemes, as the incentive for the unemployed to invest in new employment is blunted (a type of 'moral hazard'). To counter this, the state could moderate benefit schemes, or put in additional instruments to promote the return of unemployed persons to the labour market. Here again, employment reintegration services can be provided for by the state itself or by private firms, and again there may be trade offs between efficiency on the one hand, and other public values such as equal access on the other.

Under present day more privatized conditions, the overall system design tends towards a division of labour in which market parties provide forms of income security and related services, while state activities are more and more limited to providing safeguards against breaches of public values through regulatory

interventions. In the words of a well known NPM slogan, state interventions shift 'from rowing to steering'.[37] There is increasing evidence that a social welfare system loaded with market type mechanisms, requires a strong regulator, a market authority that can limit or even purge infringements into what constitutes the core values of the system.[38] Market type mechanisms harness specific incentives such as profit maximization, hoping to reap efficiency benefits.[39] Yet these same incentives may elicit perverse effects: opportunistic behaviour such as adverse selection or shirking. Such effects not only harm public values but will erode support for the system as a whole as well.

Yet a regulatory approach has its own drawbacks. An abundance of literature covers criticisms ranging from 'agency capture' to lack of effectiveness and perverse effects such as stifling innovation.[40] General reactions to such criticism have been discussed in a previous section. As for the regulatory welfare state: it being a recent development, there is still little documented experience about its effectiveness in guarding public values. There is no reason to assume however, that welfare regulators can easily avoid the pitfalls that regulators in other policy areas have been wrestling with.

7. SAFEGUARDING AT THE OUTPUT SIDE

Lastly, public values are at stake at the output side of a welfare system. Solidarity, the kind of social capital that is indispensable for maintaining a welfare system, will quickly wear down if the system proves inadequate: unable to produce administrative justice, or inept at efficient and effective service delivery. It is in the management of social welfare that public values are preserved or endangered at the output side of the system. And it is in the management of social welfare, that experiments in re-balancing the three forms of social order are taking place in their most concrete and visible form: marketization of public administration, primarily by way of outsourcing.[41]

One important argument underlying the use of market type mechanisms in general and outsourcing of social security services in particular concerns the attitudes of the public servants. Traditionally the professional public servant is thought to have public value motivations: his aim is to discharge of his duties in the best interests of citizens and clients. The administration of justice is

37 Osborne & Gaebler 1992.
38 Mertens 2006.
39 Van den Hauten 2003.
40 Moran 2002.
41 Van Berkel & Van der Aa 2005.

considered to be his primary motivation. Empirical scrutiny made cracks in these assumptions as early as the late 1970s: it turned out that the sheer pressure of case overload forced street level workers in public service bureaucracies to develop coping strategies that diverged from the ideal of the administrative justice.[42] Still, in these public administration studies, not the attitude of the civil servant but the circumstances under which the street level bureaucrat had to function were considered to be the heart of the problem. Twenty years later, NPM thinking started questioning the very idea that public bureaucrats would have a different approach to their job than for instance workers in the private sector. It was wrong, Le Grand (2003) held, to portray civil servants as 'knights' – and giving them all the discretion to act as they please. The starting point for managing public service delivery should be to regard street level bureaucrats as much as 'knaves' as any other employee. A proper set of incentives and des-incentives would be needed to discipline the doctor and the social welfare worker. In this view it was required that public service delivery would operate under the same market type incentives as those for profit providers. Giving citizens different options concerning the service and the provider ('choice') would be an effective way to break public monopolies.

The prime example of the application of such ideas in social welfare systems is the outsourcing of employment reintegration activities. In many cases this has meant the emergence of a quasi market of reintegration services in which public agencies buy such services from private providers on behalf of their clients.[43] Sometimes this arrangement is accompanied by a voucher system or another way of giving clients a choice. Over the last ten years, a host of studies has been conducted to evaluate these market type arrangements and to test their underlying assumptions. Many were done in the USA,[44] but also in Australia,[45] the UK,[46] the Netherlands,[47] Germany,[48] Denmark[49] and Switzerland.[50] Most studies show that so far outsourcing does not seem to be very effective: the record of private entrepreneurs in reintegrating the unemployed is, on the whole, not better than that of public agencies. The same is true for efficiency. Contracting out comes with a lot of transaction costs to counter opportunistic behaviour of contractors. It seems that such costs offset any gains made by lower rates of the service delivery itself. Beyond that, managing reintegration contracts in such a

42 Prottas 1979; Lipsky 1980.
43 Le Grand & Bartlett 1993.
44 Domberger & Jensen 1997; Brown & Potoski 2003; Heinrich & Choi 2007.
45 Grub 2006.
46 Finn 2005.
47 Van Berkel & Van der Aa 2005; Sol & Westerveld 2005.
48 Jahn & Ochel 2007.
49 Bredgaard & Larsen 2008.
50 Bonvin & Moachon 2007.

way that other public values are adhered to, is a complicated task. For Dutch municipalities, this was a reason to reduce their outsourcing and embark on a strategy of 'modular buying'. The public account manager controls and merges the contributions of private contractors into one reintegration plan for individual clients.[51]

All together, management at the output site of social welfare systems – the implementation of welfare policies – is still moving back and forth between neo-weberian hierarchy and contract management of marketized service delivery. The state of the art in guarding public values in this area is hardly a fixed state.

8. CONCLUSION

Safeguarding public values is, from the point of view of administrative sciences, a matter of institutional balancing of the three basic forms of social order in such a way that an optimal mix of administrative justice, effective social security and efficient use of public means is achieved. It is a continuous quest that has a lot in common with aiming for a moving target. 'Muddling through' while learning on the way seems, in most cases, the best available option.[52]

Safeguarding public values in welfare systems has some specific features that have to do with the feedback mechanisms that are intrinsic to welfare institutions. Safeguarding in this area is not only a matter of harnessing adequate control mechanisms from the three areas of social order or of devising the most fitting management for welfare service provision. Beyond that, the preservations of the value of solidarity in a society, fundamental to any welfare system, requires the expression of solidarity in the make up of that welfare system.

51 Corrà, Plantinga & De Ridder 2009.
52 Lindblom 1959; Bendor 1995.

INSTRUMENTALISATION OF PUBLIC INTERESTS: A LEGAL PERSPECTIVE

Albertjan Tollenaar

1. INTRODUCTION

1.1. THE LEGAL CHARACTER OF INSTRUMENTS

Public interests can be safeguarded in many ways using different instruments. This chapter limits itself to the *legal* instruments for safeguarding these interests. The question addressed is: what instruments can be derived from law for safeguarding public interests and how are these instruments applied to safeguard public interests in social security?

This question needs to be clarified with respect to two elements, which also explains the position of this chapter between the other chapters. First and foremost, with respect to the meaning of the term *law*. In the earlier chapter law is used as a *source* on the basis of which public interests can be defined. Law is then a collection of condensed norms which gives shelter to higher values. Together these norms and values can be seen as expressions of the public interest.[1] This is the approach adopted by Vonk & Katrougalos in part A of this volume in which they formulated a number of leading principles of social security. In this chapter law has another meaning: law is not a *source* of public interests, but an *instrument* with which these interests can be protected. In this respect law is a policy instrument alongside other instruments.[2]

This leads to the second clarification, the boundary between *legal* instruments and other instruments that can be used to safeguard public interests. The feature that distinguishes legal instruments from other instruments is the shift of individual rights and obligations caused by legal instruments. Legal consequences can be realised and enforced by the courts. Other, non-legal instruments do not have this specific legal consequence. This chapter examines only the instruments

1 See the chapter of Vonk & Katrougalos in this book.
2 Fenger & Klok 2008, p. 224–225.

that do have a legal consequence. Therefore contracts do count as legal instruments and are relevant as legal safeguarding instruments, while covenants are not. After all, a contract involves reciprocal rights and obligations that can also be enforced by law. In contrast to this a covenant is much more of a gentlemen's agreement with no legal shift of rights and obligations taking place.[3]

1.2. APPROACH

The objective of this chapter is to characterize legal safeguarding instruments and examine how these instruments are deployed in safeguarding the public interests in the specific policy field of social security. To this end paragraph 2 starts with a general description of the form and varieties of the legal safeguarding instruments. The question of how these legal instruments are given substance in the specific legal field of social security is then addressed in paragraph 3. Paragraph 4 concludes with a brief elucidation of the significance of legal instruments in the safeguarding of public interests in social security.

2. LAW AS A SAFEGUARDING INSTRUMENT

2.1. IDENTIFYING LEGAL INSTRUMENTS

The legal safeguarding mechanism in a national context

The function of the law as an instrument for safeguarding public interests is largely dependent on the national legal system. In continental systems based on the *Rechtsstaat* the emphasis on safeguarding public interests is found in legislation, while in common law systems case law is a more important source of law-making.[4] The consequence of this is that in continental systems we can expect to find the safeguarding of public interests embedded in legislation, whereas in common law systems we can expect to find the safeguarding of the public interest more in the abstract principles that are interpreted by the judiciary.

This difference, however, is not as great as it first appears. After all, when the state takes control and uses the law as an instrument, the result can always be traced back to legislation.[5] The legislation provides general rights or general

3 Pröpper & Herweijer 2004.

4 The literal translation would be 'rule of law'. But as there are more than one meanings of the 'rule of law' I prefer to use the term Rechtsstaat, with all its elements.

5 According to Verdeyen 2009, p. 25.

obligations and lays down how these rights and obligations can be realised, who is empowered to perform the legal acts under public law to make such rights and obligations concrete and who is liable under civil law. Legislation forms a regulatory framework within which the independent judiciary can judge these acts. Legislation has this function in all legal systems, despite whether the system belongs to the tradition of the rechtsstaat, like in Germany and France, or whether it is based on common law, as in the United Kingdom.[6] The specific field of social security in particular is dominated by this instrumental legislation, making the nature of the legal system of less importance.

Therefore: this chapter describes the legal safeguarding instruments without reference to a specific national legal context. Where needed illustrations are used from several legal systems. As a consequence full justice cannot be done to the peculiarities of all national legal systems. The chapter suffices with a rough explanation of the instruments.

Three types of legal instruments

The ambition is to provide a *full* description of the range of legal instruments. This is, however, an impossible ambition insofar as the collection of legal instruments seems unlimited. Despite this, in an effort to give a comprehensive analysis of the legal instruments, the instruments are categorised into a more abstract group or type. The first type is the legislative power, being the source of all legal safeguarding instruments. If the legislator wishes to safeguard a public interest the first option would be creating an administrative competence under public law and empowering an administrative agency or public bodies to perform legal acts. The authorisation of public bodies and the degree in which the courts can regulate this authority form the second type of legal instruments. An alternative approach would be an intervention in existing private relationships. The legislator can redistribute responsibility between two private parties, such as the employee and the employer, or can create procedural safeguards. These instruments form the third group of legal instruments.

2.2. LEGISLATIVE POWERS

Legislative power in a legal system

Legislation is based on a legislative power. In many systems the adoption of general binding rules can be traced back to the constitution. In non-

6 For France see: Auby & Cluzel-Métayer 2007, p. 77. For Germany: Schröder 2007, p. 120. For the United Kingdom: Partington 2004, p. 142.

constitutional states, such as the United Kingdom, this power can be traced back to the principle of the sovereignty of parliament: all legislative power is based in parliament.[7]

Quite often a number of entities can be distinguished that are each individually authorised to legislate. The legislative power is related to a territorially or functionally defined jurisdiction. Where the legislative power is divided and distributed among more legislators the relationship between these legislative powers becomes interesting. In a federal relationship the legislating entities are on an equal footing, whereas in a decentralised relationship a hierarchy can be distinguished between an 'upper' legislative level and a 'lower' legislative level.[8] This hierarchy implies that the legislation of the upper level can restrict the legislation of the lower level. However this does not detract from the fact that the decentralised legislative levels have free regulatory powers within the hierarchical framework.

The European and international legal order

Apart from the allocation of legislative powers within a state, general binding rules can also be derived from supranational entities, such as international and European bodies. European law forms an independent, autonomous legal order, from which citizens and member states can derive rights and obligations.[9] These rights and obligations can be enforced through the national institutions: after all, European law is ultimately implemented by national administrations and national courts.

In addition to the European legal order there is the international legal order that lays down preconditions that must be complied with by national systems.[10] The exact meaning of these legal norms under international law and whether or not a citizen can invoke a provision from international law depends on the national legal system. In some systems these norms only become binding once they have been transposed into national legislation.[11] In other systems the binding effect depends on the substance of the provision. Thus in the Netherlands norms

7 Partington 2004, p. 31, Heringa & Kiiver 2007, p. 21.

8 Heringa & Kiiver 2007, p. 29. Examples of a federal relationship: United States, Switzerland, Germany, Belgium. With respect to some aspects the Kingdom of the Netherlands is also a federation, namely in the relationship to the components of the Kingdom. This does not detract from the fact that the Netherlands is usually considered to be a decentralised state, as is the United Kingdom and France.

9 European Court of Justice Case 26/62 Van Gend & Loos (1963) ECR 1 and Case 6/64 Costa v. ENEL (1964) ECR 585.

10 See Vonk 1999 for the significance of international law for national social security law.

11 This, for example, is the case in Great Britain.

contained in international conventions become binding after they have been announced and insofar as the substance of them is generally binding.[12]

Safeguarding public interests through the allocation of legislative power

The decision as to which forum is competent to legislate is important for a number of public interests. In the first place the legislating level has consequences for the *legitimacy* of the rules. Legitimacy is considered to be part of good governance.[13] Legislation is adopted in a legislative procedure. This procedure provides for endorsement by those whom the decision addresses. Moreover, the legislative procedure is public and accessible, allowing room for consultation and recommendations before legislation is adopted.[14] Both are mechanisms aimed at increasing (democratic) legitimacy.

European legislation illustrates a second public interest that is safeguarded by the choice of legislative level: by placing legislative power at a higher level, *inequalities* can be reduced. Indeed one characteristic of legislation is that it addresses a general group of citizens. The fewer jurisdictions there are, the fewer differences there will be between the different jurisdictions.

2.3. DIVISION OF POWERS BETWEEN THE ADMINISTRATION AND THE JUDICIARY

Often legislation provides powers for administrative bodies. The law may empower an administrative body to grant permits, to enforce prohibitions or to pay benefits. The other side of the coin is the settlement of disputes by an independent judiciary. The judiciary has the task to settle disputes between the citizen and the administration arising from the application of legislation. In other words: legislation results in a division of competencies between the administration on the one hand and the judiciary on the other hand.

Discretionary powers for the public authorities

The judicial review is limited in line with the extent in which the legislator allows the public bodies discretion. Allowing the public bodies discretion is sometimes

12 Art. 93 of the Dutch Constitution.

13 See chapter by Vonk & Katrougalos in this book, which defines this interest. The connection between 'good governance' and legitimacy is explained in literature on 'good governance'. See for example: Van Montfort 2004.

14 Perhaps the best example is the Administrative Procedure Act in the United States, in which the procedure to be followed to lay down binding rules is fully regulated and provides various opportunities for consultation.

the result of a well-considered decision, when the legislator grants the public authorities freedom with respect to the choice it makes when deciding whether a subsidy or permit shall be granted.[15] Discretionary administrative powers facilitate tailor-made solutions that would be impossible if the public body has to apply general rules.

Alongside this well-considered discretionary power aimed at facilitating tailor-made solutions, discretionary power can also be created unintentionally. For example because it is impossible to encompass the complex reality in general rules. The legislator then uses vague terms that require further interpretation. Regardless of the origin of discretionary power, it is always the public body that has to make a decision in the first place. Only when a dispute arises does the court, in second instance, pronounce judgement regarding the administrative decision.

Judicial review

When the dispute arises the judge has to answer the question how far he can impose his opinion on that of the administrative agency. Where does the discretion of the public body end and judicial review start? In German law the beginnings of an answer to this question can be found in §20 Grundgesetz:

> Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.

The use of administrative power by the administrative agency is thus defined by acts (*Gesetzsmäßigkeit*) and the law. In first instance the court has to investigate whether the administration has violated a written legal rule and in second instance the court will answer the question of whether another, unwritten, principle has been violated.

This distinction between written and unwritten law (legal principles) can be found in all legal systems. For example in English law this test is laid down in *Associated Provincial Picture Houses v. Wednesbury Corporation*, where the court tested the exercise of administrative discretion against the requirement that this should be 'reasonable':

> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive

[15] Compare de pouvoir discretionnaire in French law (Auby & Cluzel-Métayer 2007, p. 77) and the doctrines with respect to Ermessen and the unbestimmte Rechtsbegriffe in German law (Schröder 2007, p. 130).

> sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.[16]

In the United States the Supreme Court defined a similar test in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (467 U.S. 837 in 1984). In the Netherlands the same test is included in the case *Doetinchemse woonruimtevordering* (HR 25 February 1949, ABKlassiek 2003, 8).

Although the judicial review in the legal systems is comparable, there are differences in emphasis. In continental systems, such as Germany and France, much weight is attached to the *legality principle*. As a result the statutory boundaries create very narrow frameworks for review: if the public body acted without an authority provided by the legislator, this in itself can be sufficient grounds for nullifying the legal act.[17] In the United Kingdom, where less weight is attached to the legality principle, the public body is competent *unless* it can be derived from the legislation that this is not the intention. Thus even if the public body did act without legislative authority, this does not necessarily have to mean that this is contrary to the legislation. The judiciary reviews *ultra vires* and addresses the question of whether the public body acted in the spirit of the legislator.[18]

Additional norm setting by the public authorities

Administrative powers are quite often limited to the individualising of the law: public authorities can perform *individual* legal acts. In addition public bodies sometimes also have regulatory powers, with which it is able to lay down further rules. These regulatory powers actually shift partly from the legislator to the administrative body.

---

16 Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223.

17 This is primarily the case if the act of the agency is qualified as negative state conduct, which restricts the citizen in his freedom or rights.

18 Principally in British law: Anisminic v. Foreign Compensation Board [1969] 2 WLR 163.

The choices made by the public bodies in adopting these rules are left to the discretion of the public bodies themselves. In other words: the discretionary power is very wide-ranging. This forces the court to apply more restraint. As a result of this the statutory setting of norms with respect to administrative legislation focuses primarily on the *procedure* according to which these rules are created in stead of the *content* of these rules. It is interesting to realize that in many legal systems the legislation that sets norms for administrative acts often contains procedural norms relating to the way in which norms are developed. The American Administrative Procedure Act is an example of this: this act sets norms relating to the way in which administrative agencies make use of their regulatory powers. German law also provides a number of formal requirements with regard to administrative regulation. What is interesting in both examples is that violations of these standards may lead to nullification of the statutory rules by the court.[19]

In addition to the *external* binding rules adopted by the public authorities these bodies might also adopt rules with only an internal effect. Especially when public bodies have been granted a discretionary freedom one could expect additional norms being set within the administrative agencies on how to use this discretionary power. In bureaucratic practice these internal rules or guidelines are unavoidable.[20] As a result we see *Verwaltungsvorschriften* (German law), *beleidsregels* (Dutch law), *directives* (French law) or guidelines (American law).[21] These administrative rules are legally relevant as they predict the use of discretionary powers by administrative bodies.

Self-regulation

Another form of regulation is the (imposed) self-regulation by the addressees themselves. Self-regulation often takes place within the framework of a power to be exercised under public law. Thus complying with the norms created by self-regulation becomes a condition for exercising a power under public law. There are various examples of self-regulation. The decision of whether or not to grant an environmental permit, for example, is based on the 'best available techniques'. The drafting of these requirements is realised in consultation with the industrial sectors to be regulated.[22]

Another example concerns norm setting with regard to the acts of professionals. In the Netherlands the practicing of a medical profession depends on registration

19 Schröder 2007, p. 112–113.
20 Davis 1980; Hood et al. 1999.
21 Schröder 2007, p. 113–114; Auby & Cluzel-Métayer 2007, p. 78; Harter 2007, p. 370.
22 See art. 17 lid 2 IPPC-regulation (2008/1/EG).

in a medical register. Registration in the register depends on compliance with the requirements formulated by the professional group representing that medical specialism.[23] The same goes for professional legal groups, such as lawyers and civil-law notaries.[24]

Safeguarding public interests through administrative powers

The granting of administrative powers is relevant for different public interests. The traditional unilateral 'command and control' legal relationship, in which the administrative agency can imposed one-sided obligations on the citizen is more and more – also – a modern horizontal legal relationship, in which the norm addressee is given space to create its own standards.

In literature this horizontal legal relationship is referred to as 'new governance'.[25] In new governance the assumption is that the more closely the norm addressee is involved in the setting of the norms, the more likely he is to support these norms. Legitimacy, effectiveness and efficiency are thus important public interests for the advocates of new governance.[26]

2.4. PRIVATE LAW AS A SAFEGUARDING INSTRUMENT

The development towards 'new governance' implies a certain preference for private law mechanisms over public law instruments. If the state wishes to safeguard a public interest using a legal instrument, it is not necessary to create an administrative authority. The legislator might also change the existing (private) relationships between citizens. Public interests are then safeguarded by reallocating liabilities under private law, or by formulating procedural requirements to which actions undertaken under private law must comply. These are legal instruments, because these instruments ultimately have *legal* consequences.

Liability as an instrument

Civil relationships are entered into between two equal parties. It is this principle that distinguishes legal relationships under private law from legal relationships under public law, whereby, per definition, the two parties are unequal. However, the assumed equality between the parties in the private sphere is uncertain

23 See the Dutch Individual Healthcare Professions Act.
24 Zeegers & Bröring 2008.
25 Solomon 2008, p. 822.
26 Hoekema et al. 1998, p. 327.

because of social status and the inequality of knowledge. The manufacturer of a product knows for example more about the quality of that product than the consumer. Therefore it is impossible for the consumer to make a well-reasoned choice. He thus runs the risk that the product purchased will not fulfil his expectations.

In this example the inequality between the parties is balanced by the law by making the manufacturer liable for the product. This product liability is vested in all (European) legal systems.[27] The purpose is always to protect the weaker party against the stronger party. Whether this is about the protection of the consumer from the manufacturer, the weaker road user from motorised traffic or the employee from the employer: in all cases private law gives the weaker party the opportunity to hold the stronger party liable in the event of damage.

The reallocation is based on the assumption that the liable party will make more effort to prevent damage occurring. Manufacturers will invest more in the quality of their products and will provide information about these products for the consumer, drivers of motorised vehicles will drive more carefully, financial providers will inform their customers better about possible risks and the employer will improve working conditions to prevent illness or invalidity occurring.

Institutional safeguards

The legislator can also compensate inequalities by formulating procedural requirements for specific legal acts. Procedural requirements are institutional safeguards: the legislator makes for example the establishment of a 'supervisory committee' or 'works council' in a firm obligatory. Failure to consult the works council on certain matters, or non-acceptance of a proposed decision by the supervisory committee or by the meeting of shareholders, for instance with respect to investment decisions, opens the way for the legal act to be nullified by the court. A fairly recent example of the meaning of this obligation is the decision taken by the board of Fortis Bank, without consulting the shareholders, which was annulled by the Belgian Court of Appeal.[28]

Creating institutional arrangements to safeguard public interests is an often used instrument. In the Netherlands there are educational committees, in which students participate, to supervise the quality of the teaching that have to be

27 With regard to product liability this arises from the European Directive on Product Liability (85/374/EEC).

28 Brussels Court of Appeal, 12 December 2008, 2008/KR/350. Later this court ruling was quashed by the higher Court of Cassation by its decision on 19 February 2010, C.09.0118 with the main argument that the court did not take into account the 'public interest'.

consulted with respect to decisions to make changes in education.[29] Other examples are the clients' participation councils that have to be set up by care providers.[30] In all these cases the legislator creates a procedural safeguard with the objective of removing inequalities.

Safeguarding public interests by private law

The legal instruments examined in this paragraph focus on strengthening the legal position of a weaker party. These instruments make private parties primarily responsible for realising their interests. Sometimes there is a normative justification for these kinds of instruments: the state must leave space for the private sphere. But there is also a more practical or economic justification: intervention by the state in the form of general rules or in the form of providing facilities, leads to market failure and therefore affects welfare.[31] Empowering private parties is often deemed to be more efficient.

However, the use of this type of instruments has its drawbacks. Most importantly, it depends on the question of whether the citizen really wants and is able to make use of his powers. Indeed, practice has taught us that there is a difference between *having* a right and *realising* that right.[32] The gap is filled by a new type of state intervention, quite often in the form of supervisory bodies. In the Netherlands for example the Consumer Authority supervises the way in which companies treat their consumers.[33] This authority can impose penalties if the supplier violates rules regarding consumer information. These facilities under public law exist *alongside* the possibility for the aggrieved consumer to hold a company liable under private law.

3. LEGAL SAFEGUARDING INSTRUMENTS IN SOCIAL SECURITY

The objective of this chapter is to examine the working of the legal instruments to safeguard public interests in social security. The history of social security shows that the public interests are safeguarded by both public and private

29 See art. 9.18 of the Dutch Higer Education and Research Act.

30 Care providers are charged with the provision of care within the meaning of the Dutch Act on Exceptional Medical Expenses and the Dutch Health Care Act (art. 1 Dutch Act on Clients' Right to Participation) the obligation to establish these committees is laid down in article 2 of this act.

31 See the chapter by Nentjes & Woerdman on the public interest in social security in this book.

32 Galanter 1994.

33 More countries have a comparable institution. In the United Kingdom the Office for Fair Trading has a similar task.

instruments. Social security is private whereas employees and employers or charitable institutions organize income security or poor relief. Social security is nevertheless public where the state intervenes and supplies, regulates or facilitates security. Every system of social security has elements of the safeguarding mechanisms distinguished in the previous section. The following is based on the study and analysis of the social security systems in a number of countries.[34]

3.1. LEGISLATIVE POWERS IN SOCIAL SECURITY

Social security is primarily a matter for *national* law and is *centrally* organised. This does not only apply to unitary states, such as the Netherlands, where one would expect legislative power to be centralised. In federal states too, such as Belgium and Germany social security is largely a federal matter.[35] Only within the federal framework do the *gemeenschappen* or the *Länder* have the power to decide how these rights will be effected and to confer supplementary or additional rights.[36]

The central bias of social security legislation that is to be found in every legal system is mitigated in two ways. In the first place there is the European and international legal order which creates norms. In the second place the setting of norms in legislation is bounded by private social security.

The European and international legal order

European intervention in national social security relates first of all to the coordination of social security between member states. European social security comes into play when an employee and his family migrate between member states. The coordination of national social security in such cases is regulated in Regulation (EC) No. 883/2004.[37] This nature of coordination does not mean to say that this regulation is not capable of interfering directly in the powers of the national legislator. For example, article 4 Regulation (EC) No. 883/2004

34 The social security systems in Belgium, Germany, the United Kingdom and the Netherlands have been chosen. This choice is based on the one hand on the relative accessibility of the sources to be studied and on the other hand on the expectation that the systems in these countries demonstrate sufficient variation.

35 For Belgium see art. 5, § 1, II, 2 sub a of the Exceptional Act (Bijzondere wet) of 8 August 1980 reforming the institutions and for Germany: § 74, Abs 7 and 12 Grundgesetz. In the meantime, in Belgium the devolutionary process has moved on; only the Flemish government introduced an insurance scheme for care dependency.

36 For Belgium see art. 5, § 1, II, 2 sub b of the Exceptional Act (Bijzondere wet) of 8 August 1980 reforming the institutions and for Germany: § 15 Sozialgezetsbuch VII. See further: Vansteenkiste 1995, p. 115.

37 With regard to the predecessor (Regulation (EC) 1408/71), see Pennings 2001, p. 6.

prescribes that persons falling within the scope of the provisions of the regulation have, in principle, the same rights and obligations pursuant to the legislation of each member state as the nationals of that member state. In other words: social security law of the Member States is not allowed to make any distinction on grounds of nationality, be it directly or indirectly.[38] Also harmonisation measures, for example in the field of the equality of treatment between men and women realised, amongst others, in Directive 79/7/EEC, have the capacity interventing directly into the freedom of the national legislator. Other EU initiatives, for example the 'method of open coordination', have a more indirect effect on the process of national norm setting.

Apart from the European legal order, there are international norms which have a bearing on social security laid, including a number of ILO conventions.[39] These conventions impose minimum standards which must be adhered to by the national legislator, for instance with respect to the level of protection provided.[40] Even if such conventions cannot be successfully invoked by individuals in court, they can still affect the political debate and can act as guidelines for interpreting legal concepts.

Private social security

On the other hand legislating power is bounded by the social security that arises in the private sector. The principle of subsidiarity is especially in the field of social security very important. The state has to leave room for private initiatives. Where work related risks are concerned the first responsibility lies with (representatives of) the employers and employees.[41] For example, work related risks can be regulated in the context of the labour relationship, on the basis of collective agreements on a corporate or sectorial level. The freedom of the social partners to organise and bargain collectively constitutes the foundation of the International Labour Organisation and is recognized in the two core conventions No. 87 and No. 98.[42]

The influence of private interests may also affect the administration of social security. In many countries the social security systems are not directly administered by government agencies, but indirectly by quasi public institutions

38 The discrimination prohibition is another material rule in European law that affects the national social security systems, see Vonk 1999, p. 12.

39 More specifically ILO Convention 121 containing the general standards.

40 Pennings 2006, p. 112.

41 In the (distant) past the capacity of society to self-regulate was also an important reason not to intervene in societal arrangements through legislation as far as this concerned the security of subsistence. With regard to the charity and the meaning thereof for the safeguarding of public interests: Plantinga & Tollenaar 2007.

42 Verdeyen 2009, p. 59.

or otherwise by private organisations regulated by law. These alternative forms of administration are often rooted in a long tradition of corporatism between employers and employee organisation and of self government. For example German law operates on the basis of the Prinzip der Selbstverwaltung:[43] citizens must in principle be able to solve, arrange and manage their own problems.[44] As far as social security is concerned this leads to the explicit observance of a self-regulatory power for Selbstverwaltungs agencies within the framework of the Sozialgesetzbuch under public law. These Selbstverwaltungs agencies may have legal personality under public law and have powers under public law, but they are compiled by the citizens involved, and the legislation allows them some room for supplementary norm setting under public law.[45]

Similar forms can also be found in other legal systems. In Belgium, autonomous public agencies, referred to as *parastatalen*, are responsible for the administration of a number of social insurance schemes, but in their turn these agencies are supported by private, non-profit organisations. These often are the heirs of the first free social insurance associations. They require recognition as social security institutions and are thus subject to supervision based on the legislation.[46] In the Dutch social security system private administration is particularly developed in the area of supplementary pensions set up by employers and employees on the basis of collective labour agreements. The administration of these pension funds is often outsourced to private insurance companies, the activities of which are regulated by law and supervised by public authorities, most importantly the Central Bank. The insurance of health costs is another example of a private arrangement within a public framework: it is mandatory for citizens to take out insurance to cover health costs, but they are free to decide which health cost insurer they want to conclude this insurance with. The activities of the health care insurance companies are strictly supervised by a governmental agency.

By imposing requirements with regard to the organisational form or by subjecting the organisations to supervision, the state makes room for the social security provisions created in the private sector. The social security legislator may withdraw at times, but new legal arrangements then come into play under which the state is the regulator. And although the state may not formulate material rights, it does create procedural safeguards, or it is the facilitator that (also) applies other, financial, instruments.[47]

43 Becker 2003, p. 226.
44 Maurer 2009, p. 570.
45 Becker 2003, p. 226, see further § 44 SGB IV.
46 Verdeyen 2009, p. 49.
47 According to Klosse & Vonk 2000, p. 191 and Plagemann 2003, p. 438–439.

3.2. THE DIVISION OF POWERS BETWEEN THE ADMINISTRATION AND THE JUDICIARY

The division of powers between the public authorities and the judiciary has special features in the field of social security. On the one hand the legislator occasionally explicitly refrains from granting discretion and opts for a penetrating judicial review – even though one might assume that statutory discretion would be granted to the public bodies. On the other hand, discretion is sometimes unavoidable when the public body exercises its administrative powers on the basis of facts that can only be established by an expert. This applies, for example, when an assessment involves a medical claim.

Tailoring and administrative discretion

In §8 the German Bundessozialhilfegesetz contains the explicit obligation to make tailor-made decisions:

> Form und Maß der Sozialhilfe … nach pflichtmäßigem Ermessen zu entscheiden.

In almost all systems of social security especially social assistance requires tailoring: the individual circumstances have to be taken into account. Therefore the public body must consider the individual interests.

There are, however, risks accompanying this discretion. Discretionary powers are a 'two-edged sword for benefit recipients': on the one hand wide-ranging discretionary powers facilitate tailoring, on the other hand inconsistencies and arbitrariness lie in wait.[48] During the reform of the 'income support' in the 1980s in the United Kingdom the scales tipped in favour of codified rights for citizens and less room for discretion for the administration, at least where assistance payments for regular expences were concerned.[49] A similar tendency can be observed in Germany and the Netherlands.[50] The result is: less room for the administration, and more room for the judicial review.[51]

---

48 McKay & Rowlingson 1999, p. 134.

49 Wikeley & Ogus 2002, p. 275.

50 For Germany see: Schellhorn & Schellhorn 2002, p. 97–98. For the Netherlands: CRvB (Dutch highest court for social security decisions) 8 November 2005, USZ 2006, 13.

51 The little discretion that is left for public bodies is to calculate the financial resources of the citizen, or in finding a solution to the question of whether the exceptional costs can be met from the resources and the assistance provided.See for Germany: Schellhorn & Schellhorn 2002, p. 98 and for the Netherlands: art. 35 lid 1 Work and Social Assistance Act.

Establishing facts when assessing a claim: the definition of medical concepts

In other areas of social security the public body does have room for some discretion, making it difficult for the judiciary to fully assess the decisions being made. Determining the incapacity for work of the employee who applies for an invalidity benefit, requires a medical assessment by a doctor. It is interesting that every system of social security copes with the standardization of the fact finding by these experts. In the United Kingdom the doctors' reports are regulated in regulations, which focus on the *method* of assessment and do not provide substantive qualification with regard to established facts.[52] In Germany even the definition of *Arbeitsunfähigkeit* is left to the guidelines that are formulated by the profession itself.[53] This is comparable to Dutch law, whereby appointed protocols set the norms for the company doctors' reporting.[54]

The role of the experts' opinions in the field of social security law has consequences for the judicial review. The court is more or less forced to show deference with regard to the facts that are established by a (medical) expert. This is unavoidable because the court itself lacks the medical knowledge to impose its opinion on the medical opinion of a doctor. As a result the judgement by the court focuses on procedural leverage points, which reveal something about the quality of the opinion. Relevant facts here include who has carried out the medical examination (is this doctor sufficiently qualified?) and the method by which the examination was carried out (were the relevant protocols applied?). With regard to substance the medical examination can only be invalidated if another expert's report is produced to contradict it.[55]

Where the latter is concerned, the United Kingdom offers an interesting in-between variant, whereby in the phase preceding the safeguarding of the legal rights disputes are heard by an external Tribunal. This Tribunal consists of three independent members, including a medical professional. The Tribunal can impose its ruling in the place of the administrative agency's decision (in this case: the Department for Work and Pensions' Benefits).[56] In this way more room is created for a penetrating assessment of the medical facts during the legal proceedings.

52 See Borghouts-Van de Pas & Pennings 2008, p. 42.
53 These guidelines are based on § 92 SGB V.
54 See Regulation of protocols for insurance physicians with regard to incapacity for work acts.
55 De Graaf, Schuurmans & Tollenaar 2007, p. 3–15.
56 The protection provided by the Tribunal bears some similarities to the objection stage in Dutch law, whereby a medical insurance expert re-examines the facts established in the primary phase.

3.3. PRIVATE LAW AS A SAFEGUARDING INSTRUMENT IN SOCIAL SECURITY

Public safeguards in private disputes

With regard to the work related risks, social security is entangled with labour law. The legislator sometimes makes explicit use of the existence of a private legal relationship to safeguard public interests. Employer's liability for sickness and invalidity is an example of this. This liability is given substance, amongst others, by the obligation laid down by law to continue to pay wages if the employee is unable to perform his or her work as a result of illness. In the United Kingdom this obligation arises from the obligation for the employer to pay a Statutory Sick Pay (SSP) to the employee who is ill for longer than four days. The SSP consists of a fixed sum per week and is paid for a maximum period of 28 weeks. In this way the employer himself experiences the disadvantages of his employee being absent due to illness.[57] In the German system there is an obligation to continue to pay wages (Entgeltfortzahlung), albeit that this is limited to six weeks and many companies are partly compensated under public law.[58] In the Netherlands the employer bears the risk of his employee falling ill and in the event of his employee falling ill the employer must continue to pay wages equivalent to at least 70% of the wage for a period of two years.[59]

The definition of this liability under private law expresses the fact that the relationship between employer and employee extends beyond the performance of work in return for the agreed wage.[60] Furthermore, it is assumed that the employer shall avoid the situation in which his employee calls in sick by, for example, investing in good employment conditions. On the other hand it is assumed that the employee shall call in sick less often given that he or she is not supported by an anonymous government agency but by a visible opposite party, namely the employee's employer.[61]

A consequence of this re-definition of the liability is that simple disputes will arise regarding the question of whether or not the employee is indeed ill. This is primarily a matter for private law: the employee calls in sick and is required to submit some sort of proof in order to realise his or her right to continued wage payment. The employer can invalidate this proof. In every legal system in which the legislator includes the risk related to illness in the labour relationship,

57 Wikeley & Ogus 2002, p. 530.
58 Based on §617 BGB (German Civil Code) and the Entgeltfortzahlungsgesetz. See also: Hoogendijk 1998, p. 226.
59 Based on art. 7:629 BW (Dutch Civil Code).
60 Schmitt 2007.
61 Fluit 2001.

arrangements are made under public law to settle this type of disputes. In the German system the employer can report to the benefits agency, which must then investigate whether the absence due to illness is justified.[62] In the Netherlands this type of disputes leads to civil law actions to claim wages, during which the employee is required to request a second opinion from the public body's doctor.[63] These examples illustrate that although the legislator may opt to use liability under private law as an instrument to safeguard public interests, arrangements under public law are necessary to balance the undesirable effects of the private power game.

Public safeguards in private institutions

The empowerment of the employee, benefit recipient or client forms an argument for ordering the establishment of works councils or clients' participation councils. These institutions are another type of legal instrument meant to safeguard public interests. Examples can be found in every legal system. In Germany there is the *Betriebsrat* on grounds of the *Betriebsverfassungsgesetz*, in the United Kingdom the Works Council on grounds of the Information and Consultation of Employees Regulations 2004 and in the Netherlands there is the *ondernemingsraad* on grounds of the Works Councils Act. The function and authority of these councils varies from country to country. In many cases these councils are able to influence the way in which social policy is given substance within the company through the right to consultation and recommendations. For example, with respect to the way in which the employer gives substance to preventive measures with regard to absence due to illness.

Other institutional safeguards are the clients' participation councils, established by agencies under public law charged with the provision of social security. In the Netherlands persons entitled to national assistance, an unemployment benefit or an invalidity benefit are able to exert influence through so called *cliëntenraden* set up by the administrative institutions.[64]

Finally, complaint procedures also represent an institutional safeguard. In particular when services are provided by public institutions, the law often arranges for a complaint procedure. In the Netherlands this procedure is laid down in the Dutch General Administrative Law Act. In the United Kingdom

62 On grounds of § 275 SGB V the medical service of the Krankenkas must start an investigation in the case of 'begründeten Zweifeln an der Arbeitsunfähigkeit, insobesondere auf Verlangen des Arbeitsgebers'.

63 The employee submitting a wage claim must also submit an expert's opinion on grounds of art. 7:658b BW (Dutch Civil Code).

64 See art. 7 Work and Income (implementation structure) Act and art. 47 Work and Social Assistance Act.

these procedures are regulated by the public authorities charged with the administration of the different facilities. This applies for example to the Jobcentre, which exercises the most authority.[65] The most important characteristic of a complaint is that it seldom results directly in legal consequences. A grounded complaint does not lead directly to the invalidation of a legal act, or to the creation of a new legal right. On the other hand, complaint procedures are pre-eminently suited to protect a public interest as 'good governance': after all in the ideal situation the quality of the service provision is thereby enhanced.

4. HOW DO LEGAL INSTRUMENTS WORK?

The above reflections on how legal instruments work in general and in social security in particular bring us to three conclusions. In the first place, the legal instruments offer a number of choices between what at first sight are contradictory public interests. For example, at the level of the legislative authority, a uniform and equal social security system is an argument for granting legislative power at a high legislative level. Legitimacy, effectiveness and tailoring are, however, reasons for granting regulatory powers at a level closer to the norm addressee.

With regard to the substance of the legislation we are faced with similar dilemmas. The legislator can choose between open norms, which make more tailoring and effective decision making possible or closed norms, whereby equality and legal certainty are safeguarded. The degree of penetration of the judicial review is also dependent on this choice. The more discretion the legislator leaves to the administration to seek tailor-made solutions or to qualify facts, the less the courts are able to judge the substance of the administration's opinion.

These tensions are also revealed in the use of instruments under private law. On the one hand, these instruments steer by creating incentives and thus contribute to an awareness of responsibility and an efficient distribution of social security. On the other hand, it is exactly this type of incentives that can lead to external effects, which make new public interventions necessary. The employer who is liable for the illness of his employee can, for example, rather than investing in better employment conditions decide to take this risk more into account when selecting new employees with the result that some groups, especially elderly people and handicapped persons, fall overboard. The legislator will have to act to reduce these threats of inequality, for example by introducing new legal competences for the administration.

65 See <www.jobcentreplus.gov.uk>.

The second conclusion relates to the range of legal instruments. Legal instruments have particular consequences for *individual* legal relationships, which can only be realised at that individual level. Ultimately the employee or benefit recipient has to enforce his or her rights. The law is tailored to this individual administrative justice and cannot claim that it is able to safeguard public interests at a more general level.[66] If the employee or the benefit recipient refrains, for whatever reason, from enforcing his or her right, the public interest in respect of which the right is granted will never be realised. For this reason alone, non-legal instruments are indispensable.

This latter observation brings us to the third conclusion: in an extended system of privatisation it is unavoidable that new instruments under public law will turn up to compensate the economically and socially weaker party. The working of private instruments depends on an equal playing field. If parties are unequal there is reason for the state to intervene with supplementary instruments. Supervisors and institutional safeguards are the result. Hence, the privatisation of social security, does not result in less state intervention, but to state intervention of a different sort. This is exactly what the regulatory welfare state is all about.

66 Leaving aside the systems with a Constitutional Court, where the Court can interfere on a more abstract level. Nevertheless: even these courts are limited to the legal arguments and will have to respect the political decision-making.

INSTRUMENTALISATION OF THE PUBLIC SPHERE: A PHILOSOPHICAL PERSPECTIVE

Pauline Westerman

1. INTRODUCTION

In 1972, the Indian government issued a law which specified the minimum wage farmers should pay to their servants. In his fascinating book 'The Poverty Regime in Village India', the Dutch sociologist Jan Breman described its effects.[1] Nothing seemed to change for the landless workers, who remained underpaid and never received more than half of the prescribed amount of rupees. It did, however, positively affect the income of the inspectors. From that time on 'they travelled around the countryside, not to ensure that landowners were complying with the law, but to threaten them with prosecution unless they paid them a bribe'.[2] The poverty-stricken caste of the Halpati was not helped at all by governmental regulation.

Had the Halpati been able to read this volume, they would probably not have understood its efforts in pointing at the state as the ultimate safeguard for social security. Virtually all policies and programs issued by the democratically elected government seemed to founder on the incapacity of the system to provide a minimum of security and justice. Apparently, state regulation is not sufficient to safeguard their socio-economic rights, not even in those cases in which the state is democratically accountable.

The sad story seems to capture precisely the problems that are central to this volume. It makes clear that by declaring social security a 'public interest' nothing is yet said about the question who is the best candidate for safeguarding such a public interest or, more interestingly, *how* such a public interest should be dealt with. Pointing to the state as the ultimate protector of socio-economic rights does not solve the interesting question *under which conditions* the state can

1 Breman 2007.
2 Breman 2007, p. 90.

execute its public tasks in a satisfactory way and *how* it should execute these tasks.

In order to answer these questions we should avoid the temptation to identify too easily the public sphere with the official sphere. These are separate domains.[3] Although public *law* indeed refers to the organisation of the state and its relation with the citizens, the same does not apply to other things called 'public'. A public house does not belong to the state. All we intend to say by declaring houses, gardens, restaurants and even Hyves pages 'public' is that they are open and accessible to all.[4] In this sense, the market is a public place, even though it is regulated by private law. What is more: its public nature (openness and accessibility) is safeguarded by private (anti-trust) law.

In this contribution I will argue that in order for states to safeguard different interests – including socio-economic ones – in a reliable and effective way, there needs to be a strong public sphere, to be differentiated from both the private and the official domain. The features of such a public sphere will be sketched, in fairly simple terms, as the result of a process of representation and abstraction. On the basis of this rough sketch, I will develop three normative requirements by means of which strong public spheres can be distinguished from weak ones. On the basis of these requirements the question can be addressed to what extent and under which conditions the nation-state is able to maintain a strong public sphere in which not only liberty-rights but also socio-economic rights are safeguarded. After having outlined the weaknesses of the welfare state in preserving a public sphere, two alternative candidates are examined: lower level institutions and the judiciary. It is argued that all three have difficulties in optimising the three requirements. The article concludes by proposing some possible remedies.

2. MAKING ONESELF UNDERSTOOD

The boundary that distinguishes the private sphere from the public domain is an essentially contested one. Frontiers shift incessantly. The mediaeval custom of the nobility to receive important guests in their bedroom may suggest to us that at that time a private life as such had yet to be invented. But the mediaeval noble might draw the same conclusion if he could have witnessed our ease in talking

3 In the words of Eisenstadt: 'The concept of a public sphere entails that there are at least two other spheres – the 'official' sphere of rulership and the private sphere – from which the public sphere is more or less institutionally and culturally differentiated. It is, therefore, a sphere located between the official and the private spheres.' See Eisenstadt 2006, p. 143–166.

4 Habermas 1962, p.13.

about emotions or sexual problems on the television. These examples may alert us to the fact that the dividing line between public and private is mainly determined by *how we act*. The nobles may have received people in their bedroom but they did not act in a very private way. They may have worn night-gowns but their conduct was a very formal one. On the other hand, what strikes us in witnessing people on TV, is that they speak to us as if we are close friends instead of an anonymous audience. What we call private and public is therefore closely connected with a *certain way of doing* things.

This difference in attitude can rather easily be explained. If we start with the simple notion of the public sphere as a sphere which is 'open and accessible to all', it is clear that it is nothing more – nor less – than the world where we have to deal with people who might not be familiar to us and who may even be strangers. This implies that in the public domain a different form of behaviour is called for, which enables us to deal with such people. We can no longer rely on the many implicit rules, conventions and customs that regulate our lives with family members and intimate friends. We have to find ways in which we can be understood by others, who may *not* share these tacit assumptions.

This can be done by conducting affairs in a particular way; namely by adopting roles and rules. Both rules and roles generate a stock supply of meanings that are shared and therefore accessible to all involved. The simplest example of someone who adopts a role is the ritual dancer who bears a mask.[5] In doing so, he does not act out his 'true and authentic self' but represents himself on a different level, by playing a role that is recognizable to others. This role can be a very concrete one, e.g. where a particular ancestor is represented, or an abstract one ('evil forces'). What is important, however, is that the represented item can be identified, and recognized by others.[6] In adopting a role, I represent myself as someone who is accessible and understandable to others, even strangers. I make myself public, so to speak.

We engage in this form of communicative behaviour daily. In choosing a special type of clothes, or a special trendy type of iPod, I indicate that I want to be regarded as a certain person. In order to succeed in this, I have to make sure that that role is understood by the others. In some contexts, for instance in academic circles, the proudly displayed Vuitton bag would probably not even be noticed. The bag then fails to help me represent myself, just as the masks of the ritual dancers fail to represent the ancestors in the eyes of an audience that mainly consists of tourists. Roles rely on shared meanings relating to the representation.

5 Grimes 1975.
6 White 1992.

Roles also rely on shared understandings of the proper context. The black dress at a funeral has a different meaning from the black dresses worn by gothic girls. These shared understandings can be expressed by rules. These rules can be said to constitute the role. They are of the form:

> If conditions a, b, c obtain > X counts as Y in context C.

They stipulate in advance that under condition a, b, and c, and in a specified context C, a particular mask *counts as* 'ancestor', a particular dress *counts as* the expression of 'grief', and a particular utterance *counts as* 'promise'.[7] Every role and representation presupposes such a rule.

In relatively small and simple communities these underlying rules are barely noticed, because their content is well-known and does not need to be made explicit. Implicit rules are hardly perceived as rules. We only become aware of their existence if they are violated or simply ignored. So if we have to deal with newcomers or relative strangers, it will be necessary to make these underlying rules explicit. In such a context, it is no longer possible to rely on tacit background knowledge and unquestioned moral distinctions. The rules that are supposed to guide the representations we make, but also the rules that guide our behaviour and the way we relate to others should be made 'public', in the sense that they should be made explicit and clear; they should be 'published' in the sense of accessible to all involved, and – preferably – it should be possible to question the rules in a 'public' debate, which is equally open and accessible to all.

Instead of the dichotomous division of a space into a private and a public sphere that are mutually exclusive, it seems therefore more appropriate to keep the picture in mind of the wider and narrower circles that surface by throwing a stone in the water. What counts as 'public' depends on one's point of view. Viewed from the confines of my family home, the inhabitants of my village belong to the public realm. Viewed from the perspective of the village-dweller, the public realm begins outside the village. The wider the circle, the more strangers are included. The more strangers are included, the more need there is to make the rules that guide our relations, roles, and representations explicit.

If we adopt the metaphor of these widening circles, we may allow for the possibility of differentiating between what I would call 'stronger' and 'weaker' public spheres: a stronger public sphere encompasses *a greater diversity* of people, and abides by *more explicit* rules and roles than a weaker public sphere.

---

7 Humphrey & Laidlaw 2004. For a philosophical analysis of 'count-as'- norms, see Searle 1995.

3. DEGREES OF ABSTRACTION

To the dimensions of inclusiveness and explicitness a third element should be added in determining the strength of a public sphere and that is the level of *abstraction*.

In order for ritual masks, bags and iPods to function as bearers of shared meanings, they have to be impersonal. The mask represents someone *else* (the ancestor), not the bearer himself. The representation is more 'objective' than the actual living person who represents himself, which means that the representation *abstracts* from the particulars that distinguishes Peter from Jim. One may object that although this may apply to the masks of primitive man, it does not apply to modern man who, on the contrary, wants to distinguish himself by his trendy iPod. But this is a mistake. The proud owner of the iPod represents himself not as *a particular* person but as someone belonging to a *class* of people, a class of people which is fortunate, rich, modern etc. By showing off his iPod he distinguishes himself, it is true, but only by abstracting from particular and individual features and by representing himself as belonging to the desired category of people. In the public sphere, people represent themselves in categories that are more abstract than the particular individual they are in private life.

The level of abstractness of the categories can vary and is, I believe, directly linked to the inclusiveness of the public sphere in which one moves. If I am travelling in Africa there is no sense in representing myself as someone who is born in Rotterdam, not even as an inhabitant of the Netherlands. It is no exaggeration to say that only in Africa I represented myself as a European. The wider the public circle is drawn, the more diverse its members, the more the need to make one self understood in terms that are accessible to the other members, the higher the level of abstraction required. A very high level of abstraction is reached in the representation of individuals as citizens. This representation not only abstracts from the particularities of Jim, it also abstracts from more abstract roles as employee, consumer or city-dweller and turns him into a member of the abstract category of the citizenry.

It is important to note that where the roles and categories are abstract, the rules that govern these categories are equally abstract. In order to grasp the relation between categories and rules, we should distinguish between the rules that turn Jim into a citizen and the rules that are applicable to Jim once he is regarded as a citizen. The rules that turn Jim into a citizen may be general in the sense that they all equally apply to a member of a particular class, but these rules can be quite concrete. E.g. the rule that all immigrants from a specific province in Iraq who succeeded in acquiring a work permit before June 10, 2005, and who have

been employed for more than 6 months by a certified employer, are entitled to Dutch citizenship. This is no doubt a *general* rule in the sense that it applies to all those who belong to the designated category, but the category itself (immigrants from this particular province) is extremely *concrete*. However, once Jim is entitled to Dutch citizenship he enjoys a set of rights and duties that are not only generally applicable to all citizens, but which are also fairly *abstract* since they flow from the abstract category of citizenship. Abstractness of roles matches abstractness of rules.

What we see here is that the category of citizenship acts as an *intermediary* between on the one hand a set of conditions that should be met and on the other hand legal consequences.[8]

> If conditions [Iraqi province, 2005, certified employer] obtain > Ahmed counts as citizen
> If condition [Ahmed = citizen] obtains > Ahmed is entitled to rights a – z

If we keep this intermediary function of concepts such as 'citizen' in mind, it is clear at once that the choice of representing oneself as either 'consumer', 'Halpati' or 'citizen' is not entirely free. Such a choice is to a large extent informed and necessitated by the rights and duties that are attached to such a concept. In a society where rights and duties are usually accorded to castes, there is obviously hardly any need to invoke the general notion of citizen. It does not serve, in those contexts, as a viable intermediary notion connecting conditions to legal consequences.

I noted above that strong public spheres can be distinguished from weak ones by the extent to which they include diversity and the degree in which they make rules and roles explicit. To this, the third criterion of abstractness can be added. I assume that in a strong public sphere, categories and rules are of a fairly abstract nature. Abstractness is directly linked to the criterion of inclusiveness. The more a certain category abstracts from the particular properties of individuals and their specific interests, the more we arrive at the ideal of formulating rules that are generally applicable to members of the abstract category, without exceptions, privileges or favours due to some particular properties.[9]

Thinking back to the Indian inspector I introduced above, one of the things that went wrong in his enforcement of the minimum wage legislation is probably the

---

8 These so-called placeholder concepts are analysed in Ross 1957, p. 812–815. For a good Dutch overview, see, Hage 2008.

9 That is why lawyers tend to refer to abstract rules as 'general' rules. Logically speaking, this is a mistake. *Any rule is ipso* general in the sense that it refers to general categories ('all immigrants who…') What lawyers mean when they talk about the virtues of 'general rules' is that the categories of such rules are abstract enough to cover a wide range of individuals.

lack of abstraction of roles and corresponding rights and duties. The inspector *does not take on the role* of the government official at all. He therefore presumably does not feel bound by the abstract rights and duties that are attached to that role. He rather sees his job as his personal belonging; a source of personal, private income.[10] Decisions on prosecution are therefore felt to be subject to personal discretion rather than to general and explicit rules pertaining to the abstract categories designated by the law.

4. PUBLIC INTERESTS

I have described several ways of making oneself understood in a sphere that is marked by diversity. In such a sphere there will not only be a diversity of opinions, values, and rules, but also of *interests*. I don't think, therefore, that 'public interests' should be seen as interests that belong to the 'public' in just the same way as we talk about 'consumer interests' as the interests of 'consumers'. Such a manner of speech presupposes a unity (the 'public') which does not exist. Rather, we call something public the more a certain space includes *different* people and interests. To talk about 'the' public interest is therefore often no more than a rhetorical device in order to conceal these differences and to elevate one particular interest above the others under the guise of its so-called public nature.[11]

Such an a priori definition of 'public interest' overlooks the fact that a definition of the public interest is precisely what is at stake in those debates which revolve around the question *what* exactly we should make 'public' (open and freely accessible). These debates are all about the demarcations of the public sphere: e.g. what should we prefer: an open and accessible (public) *market* in which there is free competition between different transport businesses? Or do we prefer to turn *transport itself* into a public commodity, i.e. freely accessible to all?

An advantage of my analysis of 'public' as denoting a particular *way of dealing* with relative strangers is that it does justice to that debate. The public interest is then not an interest of the public but consists in a way of handling conflicting interests. In line with the dimensions discerned above (inclusiveness, explicitness and abstraction) we may say that it is in the public interest to include as many interests as possible, to weigh and to balance them, to abide by explicit rules in regulating and resolving conflicting interests, and, if possible, to abstract from particulars by assigning rights and duties to more abstract and impersonal categories. In such a

10 The conditions required in order to take the role of the official bound by abstract rules, are analysed, as is well-known, by Max Weber 1980, p. 551–579. See also Eisenstadt 1959.

11 Rousseau's concept of the *volonté générale* is an example of such a strategy.

way, interests are *made* public instead of being presupposed to 'exist' prior to how we deal with them. In a strong public sphere, there is an open (inclusive, explicit) discussion about which commodities should be publicly available.

I would like to defend the view that these tasks should for a large part be entrusted to the official domain. By 'the official domain' I do not refer to a specific form of government, but simply to the idea of a third party, which has enough power to enforce its decisions, and which is hierarchically superior to the parties that entertain more or less horizontal relations with each other.[12] Such a third party is needed, since only such a party can develop the bird's eye view necessary to include, weigh, balance, explicate and abstract the various competing interests. The reasons for this all have to do with the importance of impartiality.[13]

To a large extent it is possible for the parties themselves to draft rules (contracts) which are explicit enough to coordinate their mutual actions but these rules cannot be used as standards for arbitration if we do not allow a third party to intervene and to arbitrate in case of conflict. The same applies to the requirement of inclusiveness of interests. In order to safeguard such inclusiveness, it should be entrusted to an institution which –although it may have its own interests – does not have any directly competing interests which interfere with the other interests. And finally, rights and duties which are sufficiently impersonal and attached to abstract categories rather than to particular persons with their particular interests can only be allocated by the proverbial impartial judge who is blind to individual particularities.

In other words: in order to turn the public sphere into a strong public sphere, which is sufficiently inclusive and impersonal as well as guided by explicit and abstract rules, an official sphere is needed, which is superimposed upon the horizontal relations that are entertained by the parties themselves. By drawing attention to the importance of these functions, I am, however, not necessarily committed to a view about *who* is best equipped to exercise these functions. Several options are conceivable. Not only the nation-state but also professional organisations, all kinds of supervisory boards as well as the judiciary may all come forward and present themselves as suitable candidates. I only claim here that these candidates should be assessed and evaluated according to the three above-mentioned criteria of impartiality (reached by inclusiveness, explicitness and abstraction) in order to ensure that a diversity of interests is taken into account and coordinated. If a certain institution lacks the required impartiality, that institution is unfit as defender of the public realm.

---

12 See Simmel for a fascinating analysis of the differences between dyadic and triadic relationships, in: Wolff 1964, p.122–125.

13 Habermas 1988, p. 79.

5. THE WELFARE STATE AND THE PUBLIC SPHERE

So far, I have assumed and argued that the three requirements listed above all point in the same direction. It seems a plausible argument: in order to include as many interests as possible, one has to be impartial and abide by explicit and abstract rules.

However, precisely this assumption has been questioned. The debate concerning the vices and virtues of the welfare state revolves around the inclusion of socio-economic interests. It has been argued that the inclusion of such interests is not beneficial to a strong public sphere, but rather *risks jeopardizing* the neutrality and impartiality of the nation-state. This view has been put forward forcefully by Ernst Forsthoff, when in post-war Germany the very first contours of a *welfare state* became visible.[14] According to Forsthoff, the nation-state can only retain its impartiality by confining itself to classical liberty rights. As soon as the state adopts the role of distributor of socio-economic burdens and benefits, it forfeits its role as neutral arbitrator.

This may sound quite paradoxical. Why would a state, (or for that matter, any third party) jeopardize its impartiality by including *more* rights and interests? The opposite seems much more plausible. Forsthoff's argument is mainly based on the difference between safeguarding and creating rights. According to Forsthoff, a classical 'Rechtsstaat' mainly safeguards existing (liberty) rights. A *Sozialstaat*, on the other hand, does more than that. It carries out a program in order to establish new rights, to create welfare, and to achieve a just distribution of burdens and benefits.[15] The welfare state is 'ein Staat der Leistung und der Verteilung'.[16] Whereas the classical rights are negative limitations of the power of the state, rights, 'vor denen die Staatsgewalt halt macht',[17] socio-economic rights act as positive demands on the state to *perform*. Thereby, the task of the state is fundamentally altered. It can no longer act as arbitrator but turns into a regulator with interests of its own that enter in direct competition with those of (groups of) citizens.

The difference between negative and positive rights has been the subject of an extended debate,[18] which – although interesting – I will not repeat here. I only want to draw attention to the fact that the distinction between positive and negative rights to a large extent depends on the assumption that negative liberty-

14 See Forsthoff 1968, p. 145–164. A more recent overview of the literature around the welfare state dilemma is given by Scheuerman 1994, p. 195–213.
15 Forsthoff 1968. p. 177.
16 Forsthoff 1968, p. 149.
17 Forsthoff 1968, p. 177.
18 See e.g. Borowski 2007.

rights should be considered as 'Vorstaatlich', existing before the state comes into being, whereas socio-economic rights are considered to be the product of state intervention. In the contribution by Brinkman to this volume, the various attempts to argue in favour of such rights have been dealt with.

This distinction between pre-existing rights and rights that result from state-intervention can be attacked from both ends. On the one hand we may argue that both kinds of rights should enjoy a 'pre-state' status. One may then argue that Locke's natural rights to life, liberty and property should be extended to encompass the rights to income, housing, education etc. Or we may argue the other way round by saying that since no relevant distinction can be made between the two bundles of rights, *none* of these rights should be seen as existing prior to the state. In that case we should consider property rights as well as the right to free speech etc. as just interests that ought to be balanced against other interests. Both strategies discard the somewhat disingenuous move to elevate some rights over others by just declaring them to be 'natural rights', prior to the state.[19]

Forsthoff's fears can therefore be dispelled by adopting either of these strategies. Only then can we hope to break through the dichotomy between a state which has to safeguard negative rights and a state which adopts the more positive role of creation and distribution; a dichotomy which – empirically speaking – is already considerably undermined in view of the massive amount of planning and intervention both at the national and the European level that is required in order to establish and maintain a free market and a healthy financial climate.

However, even if we succeed in attenuating the distinction between *Sozialstaat* and *Rechtsstaat* by claiming that a considerable amount of intervention is needed for the preservation of both sets of rights, three of the issues raised by Forsthoff remain worth noting and they all three have to do with exactly those dimensions I indicated to be vital for a public sphere.

In the *first* place, we should be aware of the risk that a state which is allocating and distributing socio-economic burdens and benefits can turn into a very manipulative one.[20] This risk is all the more real in those cases where the state attaches extra conditions to the benefits (pensions, subsidies, allowances) it distributes. The additional requirements that should be met by unemployed people in order to 'enjoy' their social security allowance may be defended by saying that rights should match duties, but it is rather easy to arrive at the

19 Westerman 1998.

20 'Kein Staat ist mehr in Gefahr, im Dienste der jeweils Mächtigen instrumentalisiert zu werden wie der Sozialstaat.' Forsthoff 1968, p. 163.

situation in which civil obedience turns into a service for payment. The welfare state, by handing out benefits and distributing assets, has infinitely more power to enforce its own aims and interests than the classical guardian-state. The recent tendency of states to turn into bank-owners does nothing to dispel these fears. On the contrary, by becoming a player in the field, and a very powerful player at that, its interests tend to *compete* with those of the other players involved. The state risks losing the bird's eye view that is needed in order to meet the requirement of inclusiveness, which I indicated to be necessary for a strong public sphere.

In the *second* place, the required abstraction of categories and rules seems to be endangered as well. Forsthoff observes that in a welfare state, the citizen no longer identifies himself as a citizen, but mainly as an interest-holder.[21] This contrast may be drawn too strongly. After all, one's choice to become a socialist or a conservative cannot be seen as entirely separated from one's perceived interests. However, there is a grain of truth in Forsthoff's observation that the more a state regulates the particular interests of particular groups, the more the law has to bend itself to the particularities of particular groups and particular circumstances.

The development that is discernible in the principle of equality testifies to this tendency of particularization.[22] It used to be customary to stress the first part of that principle, which requires that like cases are to be treated alike. Nowadays, however, the second part of the principle, which requires *different* cases to be treated *differently*, is emphasized and leads to increasing refinement of distinctions, categories and corresponding rights and duties.[23] The principle of equality can only be maintained at the cost of an endless proliferation of rules, all covering the specific needs of specific groups of citizens.[24] The call for tailor-made legislation is another symptom of the same phenomenon and can very well be understood as a reflection of the fact that those who distribute burdens and benefits need to take into account a wealth of particular requirements and circumstances, which inevitably leads to concretisation rather than abstraction.

This concretisation may be needed in order to arrive at fair outcomes. No one would deny that the father who distributes his heritage justly between the handicapped talented son and a champagne-drinking debauchee has to take into

21 'Er is nicht mehr primär Konservativer, Liberaler oder Sozialist, sondern Landwirt, Importeur, Sozialrentempfänger, Grossist, Arbeiter, Hausbesitzer, Ostvertriebener usw.' Forsthoff 1968, p. 153.

22 Gerards 2005.

23 Minow 1990.

24 For an interesting analysis of how such differential treatment works in the Indian case, see De Zwart, 2005 and De Zwart 2000, p. 4–7.

account the differences in needs and circumstances.[25] But it should be realized that the fine distinctions required here are at odds with the ideal of blind Justice.[26] This means that in a welfare state it will be increasingly difficult to arrive at impersonal and abstract categories and corresponding rights and duties.[27]

The *third* dimension I discerned by means of which the strength of a public sphere can be gauged is the extent to which the standards for decision making are open and accessible to all, which entails the need to make them explicit. Rules need to be explicit, clear and precise, in order to serve as a shared frame of reference, by means of which decisions can be justified as well as criticised. If this requirement is to be taken seriously in a welfare state which has to have an open eye for the different needs and circumstances of its citizens, it is clear that it cannot fail to result in excessive overregulation, in the sense that for each and every circumstance, explicit and highly detailed rules should be drafted. And the more concretely such rules and categories are formulated, the more vulnerable they are to change. Since such concrete rules are quickly outdated and cannot catch up with social or technical developments, the inflexibility of explicit rules will increasingly be seen as a major obstacle.[28]

This problem is not only anticipated on logical grounds, but is indeed conceived as one of the major problems of contemporary legislation and has led to all kinds of programs in order to reduce the burdens of overregulation. What all these programs in order to arrive at 'better regulation' have in common is the attempt to overcome these problems by reverting to open, flexible but vague standards.[29] These open standards may either invite the judge to bend the law to specific cases or they may be meant to be tailored to concrete contexts by groups of norm-addressees and stakeholders. In both cases the degree of explicitness arrived at the central level is considerably decreased.

The conclusion seems to be justified that although there is no reason to exclude socio-economic rights and interests from public consideration, we should be aware that the welfare state risks to lose the very properties needed for preserving a strong public sphere. Its distributive role may increase its power and may undermine its impartiality. The need to meet particular needs affects its power

25 Dworkin 1981.

26 According to Forsthoff (1968, p. 179): 'Im Unterschied zu den Freiheitsrechten haben Teilhaberrechte keinen im vorhinein normierbaren, konstanten Umfang. Sie bedürfen der Graduierung und Differenzierung, denn sie haben einen vernünftigen Sinn nur im Rahmen des in Einzelfall Angemessenen, Notwendigen und Möglichen',.

27 Cf. Habermas 1988, p. 52 ff.

28 An abundance of official reports comment on the inadequacy of rules in this respect.

29 E.g. *Ruimte voor Zorgplichten*, Netherlands Ministry of Justice, July 2004.

to transcend concreteness by formulating impersonal and abstract rules and finally, it will no longer be possible to meet the requirement of explicitness without suffering from overregulation and inflexibility, which will lead to the formulation of vague standards; thereby increasing the discretionary powers of decision makers.

We should add here, that if this analysis holds, it equally applies to the level of the European Union. The vast terrains covered by European regulation, together with the ambition to steer, shape and harmonize the different member-states by means of enormous amounts of subsidies and other such regulatory mechanisms, force the EC into a position that is comparable to that of the national legislatures.[30] The tendencies and the shortcomings listed above all equally apply to the European level as well.[31] We should arrive at the somewhat uncomfortable conclusion that the more interests are included and taken care of by the official domain, the more it risks to lose the virtues required of a neutral third party, which will inevitably weaken the public sphere.

6. ALTERNATIVES: THE NORM-ADDRESSEES

As I noted above, we should be careful not to indentify the public sphere with the official sphere too easily. The legislatures of nation-states and the European Union are not the only possible defenders of the public sphere. There any other candidates. In the first place the norm-addressees themselves, in the second place the judiciary. I will first examine the qualifications of the former; in the next section I will deal with the judiciary. They are both investigated by means of the above-mentioned criteria of inclusiveness, explicitness and abstraction.

The attempts to arrive at better regulation or deregulation led to a practice in which rulemaking was outsourced to the norm-addressees themselves, who are required to concretise the vague standards issued by the formal legislator. By delegating concrete rule-making to norm-addressees, mostly organised in branch-organisations and professional associations, or to supervisory boards and the inspectorate, it is generally hoped that at the central level the rules will remain abstract enough to avoid excessive detail and to withstand time and change. As I noted elsewhere[32] the rules that are issued at the central level and with which the lower echelons are confronted, may exhibit a certain amount of

30 This is reflected in *European governance: a white paper*, Brussels 2001, Commission of the EC, which diagnoses the problems with rules in much the same way as Dutch reports, and offers roughly the same therapy.

31 Westerman 2007a, p. 51–72.

32 Westerman 2007b, p. 117–133.

abstraction, but cannot be understood as ordinary rules. They do not prescribe the means in order to achieve a certain aim, but mainly prescribe the goals that should be reached. They leave it to the norm-addressees to devise the rules (i.e. rules prescribing means) by themselves. The only genuine rule here is the rule that admonishes the norm-addressee to *report* on the progress that was made.[33]

This strategy is often mirrored by lower echelons, which, in a similar vein, imposes a more concrete version of the desired aim, and likewise obliges an even lower echelon to fill in the necessary detail, i.e. to take measures or to draft rules in order to achieve the intended aim, and to report on the progress made. A chain of regulations can be discerned here. At each level, goals and aims are prescribed, whereas the actual task of rule-making is imposed on others. This chain hardly leads to any rule-making but mainly consists of an ongoing process of concretisation. At each successive step, the aims are translated into more concrete goals and targets.

This solution is beset by many problems, which I pointed out in detail in other places. The deregulation reached at the central level is outweighed by an enormous amount of excessively detailed regulation at lower echelons, the loss of legal certainty (due to the fact that the rules are tailor-made), and the growing importance of intermediate bodies of managers and self-professed rule-makers of different varieties are all just as inevitable as problematical. I will not repeat these disadvantages but confine myself to the question which is at stake here: can we expect these lower bodies of rule-makers to meet the requirements necessary for a strong public space?

The answer is, I think, a mixed one. As for inclusiveness, it cannot be denied that the practice of outsourcing rulemaking to lower echelons, increases the likelihood that more interests are included. As long as these tasks are entrusted to groups marked by strong internal social cohesion, the chances that they can shape the rules to their specific needs are increased. It is different in those cases where regulating committees and bodies are established by the central legislator for the very purpose of such rulemaking. In those cases, inclusion may not always be warranted.[34] In cases where regulation is entrusted to supervisory boards, the picture is a mixed one, depending on the field at hand.

As for explicitness, the picture is less equivocal. Rules made by lower echelons are not only much more detailed but also much more explicit than those

33 For the full argument the reader is referred to my publications, listed in the preceding footnotes.

34 The Dutch Tabaksblat committee is an example: the trade unions were not included. See Stamhuis 2006.

formulated at more central levels. The reason for this is simply that the lower bodies are usually confronted with the obligation to report on the rules they drafted and the measures they took. Since it is clearly not sufficient to state in vague terms that the goals are reached, standards need to be developed which enable the assessment and evaluation of such progress and documents need to be drawn up, stating in the most explicit terms the performance indicators, rules, codes and protocols that have been developed and instituted. The effects of such explicitness may be perverse, especially where the production of documents is seen as a substitute for a real performance or service.[35] In those cases where the rules are only drawn up in order to justify one's dealings and to account to the external world, the value of explicitness should not be exaggerated. But to the extent they are taken seriously internally as well, the process of making these rules and standards explicit may pave the way for criticism and change.[36]

The virtue that seems to suffer most from the delegation of rulemaking to lower echelons is abstraction. Rules are no longer made by (representatives of) *citizens*, but by people in their capacity of teachers (or more properly speaking: educational managers and experts) or in their capacity of health-specialists, or of consumers, or of employers, etc. etc. The picture sketched by Forsthoff of the welfare state mainly consisting of 'Interessenten' is nowhere better embodied than in the regulatory landscape of today, where these *Interessenten* are precisely the ones who make the rules. In such a landscape more people may be included, but we should keep in mind that they are included not in their capacity of being an abstract member of society but as bearers of more concrete and particular roles.

One may be tempted to think that it is better to be included *qua* teacher or consumer than *qua* citizen, represented in a distant central body by equally abstract representatives. And indeed, as far as one's own interests are furthered by such direct forms of participation, there may be some truth in this. The disadvantage is, however, that there is no longer a *locus deliberandi* where the various interests come together. Outsourcing areas of legislation means outsourcing to *specific agencies or institutions*, organised around the aim that is imposed by the central level. Rules concerning 'health and safety at work' are drawn up by committees, boards and institutions that all somehow have to do with 'health and safety at work'. They do not take into account other issues, such as environmental concerns, since they are simply not instituted to that end. Rulemaking is conducted in various functional regimes, which rarely interact with each other. This means that a bird's eye view encompassing different interests is lacking. Coordination between these functional regimes is highly

35 Hood 2006, p. 515–521.
36 Mackor 2006.

problematical. If rulemaking is delegated and passed on to below, parliament is no longer the public space where the relationship and priority of the different aims and goals can be discussed and assessed.

We should conclude then that a strong public space can only partially be safeguarded in a type of regulation in which rulemaking is outsourced to lower echelons. Only explicitness is served, whereas inclusion is doubtful and abstraction is downright problematic. It should be noted, however, that in such a regulatory landscape, the boundaries between public and private are also drawn in a different way. The process of what is commonly called 'privatization' did not make things more 'private'. On the contrary: figures and data concerning the performance of schools and hospitals are now publicly available on the Internet, and standards have become explicit which make them liable to change and criticism by outsiders. At the same time, however, affairs are conducted in a less public way at the more central level. Debates that used to be conducted in parliament are negotiated in the corridors, decisions as to the composition of important (rulemaking) bodies are taken in ways and quarters that are not accessible to the public at large (comitology).

7. THE JUDICIARY

The judge is probably the most plausible candidate to act as a third party, who by his impartiality can act as a defender of a public space. Judges include, weigh and balance the various interests involved, they do so by reference to a body of explicit rules that are used as justification for their decisions, and in judging they make use of impersonal, sometimes even highly abstract roles. The judge is about the only figure still surviving who is almost generally acknowledged to be the embodiment of the public sphere, infinitely less 'personal' than the 'ordinary' and all too human figure of the queen.

It is no wonder then that at the sight of the crumbling public authority of the nation-state, which in the form of a welfare state,, as we have seen, increasingly takes on the role of a stakeholder with interests of its own, the judiciary has been invoked not only as a rival defender of the public sphere, but also as an infinitely better one. According to several writers[37] it is to the judge we should turn for the protection of our rights and interests. It is maintained that a more active role of the judge does not flout the principles of a state based on the rule of law, but instead can quite easily be fitted in the constitutional make-up. And indeed,

[37] In the Dutch literature examples are Brenninkmeijer 1996; Rijpkema 2001, but also the official report to the government by the Netherlands Scientific Council for Government Policy: WRR 2002.

since in a welfare state it is not the judge who distributes burdens and benefits he is better equipped to see to it that no vital interests are excluded or harmed than the legislator with its programs, projects and aims.

However, there are problems here too which surface if we examine once more the three virtues required of any defender of the public space. The main problem is the law itself. As Habermas remarked, the law is the connection between two kinds of procedural legitimacy.[38] The legitimacy of the judicial procedure is to a large extent dependent on the question whether the law was administered properly. But the law can play this role on the basis of the assumption that it reflects the will of the majority of the (representatives of) the citizens. So the legitimacy of the judge depends for a large part on the legitimacy of the law and that legitimacy in turn depends on the legitimacy of parliamentary procedures of decision making. The law is therefore the connective tissue, linking democratic and judicial procedures.

This connective issue, however, is losing firmness if the central legislator contends itself with vague standards prescribing just some values (fairness and equity) or abstract aims to be pursued. If the judge has to cope with such vague standards, the degree of inclusiveness will be diminished. Inclusiveness of interests is for a large part guaranteed by the assumption that the law embodies a balance between interests since it is the outcome reached in a democratic procedure that is designed to include as many interests as possible. If the law is too uninformative to act as such a living compromise or balance, this would entail that from now on the judge can only hope to include the interests of the *parties before him*; the concrete parties of the case at hand. But obviously, this limits the degree of inclusiveness considerably.

The same applies to the virtue of explicitness. Having no recourse to explicit standards, the judge has no other option than to formulate them himself or to rely on the rules and standards formulated by others (supervisors, organisations). It is clear that the judge is often reluctant to execute the job himself. He will remain on the safe side, referring to fairness and equity, and will not take the risk that his decision be repealed by courts of higher instance.[39] If, on the other hand, he takes the virtue of explicitness seriously, the judge has no other option than to rely on the rules and norms that have been developed by the lower echelons.

However, if he chooses the latter option, he is confronted with the problem that he cannot act as the judge who is blind to the peculiarities and contingencies of

38 Habermas 1988, p. 73.
39 This risk-avoidance was criticised by Barendrecht 1992.

the concrete persons in front of him, which are relevant to the case at hand. He has to rely on norms for instance, which inform him that this particular branch of industry, of this particular size, can commonly be expected to achieve this particular level of performance in, say, health and safety precautions or environmental measures. He has to get into detail, and to take into consideration the particular make-up of the parties before him. In other words: he loses the virtue of abstraction. Although he himself may still represent the disembodied public realm, the parties before him will turn more and more into the concrete entities or living individuals they are, and whose circumstances should be taken into account. Of course, this problem is not new. It is inherent in any form of judicial decision making. What is new, however, is the extent to which particular characteristics should be considered. If norms are made by lower echelons, tailored to their specific needs and capabilities, these particular characteristics determine the norms that are applicable.

We may conclude that even if we are justified in our belief that the judge is genuinely disinterested and impartial, he cannot attain sufficient inclusiveness, explicitness and abstraction to uphold a strong public sphere on his own. He is bound by the law and the shortcomings of the law directly affect the judge as well. Vague laws will compel him to either use his own discretion, which limits the inclusiveness of interests, or to rely on standards of other bodies, which limits the degree of abstraction. Needless to say that this applies to both the national courts and to the ECJ.

8. POSSIBLE DIRECTIONS

Not one of the players in the field seems eminently suitable as a defender of the public sphere. This has nothing to do with the shortcomings of the players, but with the enormous complexity of the tasks that are undertaken. To create and sustain a society where socio-economic rights are safeguarded, where the financial climate is wholesome and a thriving market is ensured, where safety is guaranteed and the environment is protected, where sciences and arts are flourishing (but flora and fauna as well) and where a great diversity of interests, opinions and values are taken into account is something that cannot be brought about by the nation-state or by any supra-national entity. Such a task probably calls for an entirely different ordering of affairs.

It is probable that the current system of goal-regulation and outsourcing of regulation is a beginning of such a new ordering. If that is right, we should try to repair its shortcomings. The loss of abstraction is probably not to be remedied. The more regulation takes place at lower levels, the less room there is for abstract

concepts such as ' the citizen'. Probably, the functional regimes will increase in importance. Already now this is how a major part of European legislation is drafted.[40] This might imply a supranational ordering along functionalist lines. Whether such an ordering might overcome fragmentation and concretisation is yet to be seen.

As for explicitness, we have seen that rules are made extremely explicit by the lower echelons which are required to report on the progress made. Elsewhere I describe the perverting effects of such an excessive degree of explicitness more fully.[41] But its effects can be beneficial as well (enabling change and criticism). Further analysis of the conditions under which detrimental and beneficial effects can be expected seems to be necessary.

Inclusiveness should be ensured by institutionalising the way committees and boards, professional bodies and associations should be constituted. It should no longer be possible that 'self-regulating bodies' are created in a haphazard way, on the spur of the moment. Also the procedures of decision making and rulemaking should be subjected to explicit rules, safeguarding at least *a moderate degree* of transparency in these corners. Not only the outcomes (rules and codes) should be published, but also the procedures by which they were devised should be accessible to the public at large. Deficiencies in inclusiveness are then noticed more easily.

The lack of coordination that is felt so clearly in this style of legislation should be addressed by thinking of ways to manage potential conflicts between functional regimes. National authorities should probably spend less time on controlling post hoc what each sector has done and not done, and devote more time to the organisation of the traffic *between* the various sectors.

Finally, the nation-state should try to regain some of its impartiality by thinking of new ways to separate powers. Legislative powers should be strictly separated from the competences to allocate funding, subsidies and benefits. It should be constitutionally prohibited to use subsidies as an instrument to enforce policies. Safeguarding socio-economic rights should not be dependent on the performance of civil duties. Above all, it should no longer be possible to turn socio-economic rights into favours attached to civil obedience or performance.

40 Smismans 2004.
41 Westerman 2010.

9. CONCLUSION

On the basis of a broad notion of the public sphere as a space where one acts in a particular way in order to be understood by relative strangers, I have tried to formulate a few normative criteria that should be met in order to maintain that sphere. The public space should be inclusive, in the sense that different opinions, rules, values and interests are taken into account. It should coordinate these differences on the basis of rules that are explicit, clear and precise and which can therefore serve as criteria for justification as well as criticism. Finally, the categories used as well as the rights and duties attached to them should be fairly abstract. They should abstract from the particularities of the individual persons and circumstances in order to arrive at shared meanings.

Explicitness, abstraction and inclusiveness do not arise and grow spontaneously. These virtues ought to be preserved and maintained and that should be done by a neutral third party which is powerful but also impartial enough to include, weigh and balance interests by using explicit rules that cover abstract categories and attach equally abstract rights and duties to them. Several candidates present themselves as such defenders of the public sphere. The most plausible candidate is the nation-state. However, its impartiality can be said to be jeopardized by the essentially distributive tasks that are entrusted to a regulatory welfare state. The distribution of socio-economic burdens and benefits turns the state into an interested stake-holder, and, consequently, the distinction between rights and favours tends to be blurred. The subjects of such a regulatory state risk losing their abstract title of citizenship to the extent they are addressed and regulated as people with particular needs and interests. Finally, the need to draw fine distinctions according to different needs and interests, leads to an ever-growing body of excessively detailed rules.

The current tendency to overcome this fragmentation by issuing goals to be concretized by the norm-addressees themselves, shifts the defence of the public sphere to a multitude of more or less 'self-regulating' bodies, boards and committees. Although this leads to increasing explicitness of rules and standards, the requirement of inclusiveness can only partly be met. Some of these bodies are more inclusive than others and matters may vary from case to case. Clear rules concerning the degree of inclusiveness are lacking. Finally, the virtue of abstraction cannot be attained at all in this fragmented landscape. Each of the institutions and bodies are organised around a single aim. These functional regimes hardly interact and there is little room for coordination.

The increasing partiality of the nation-state together with the fragmentation that ensues where legislation is outsourced to norm-addressees have led some people

to emphasize the role of the judiciary as an important candidate for preserving the public space. However, since the legitimacy of the judge is ultimately based on the law as the product of democratic procedures, he cannot hope to escape from the increasing particularization of categories, the vagueness of the general clauses that are issued at the central level and the lack of inclusiveness resulting from deficient democratic procedures.

Wherever we turn, we are compelled to conclude that the three virtues of explicitness, inclusiveness and abstraction cannot all three be realized to the same extent. The complexity of the matters regulated by the welfare state led to a situation in which explicitness can only be attained at the cost of abstraction, and inclusiveness can only be attained at the cost of explicitness, whereas all three are affected by the apparent inability of the official domain to retain its impartiality.

We are still a long way from the situation in Gujarat, with which this article began. But we should not take that distance for granted. Where discretion comes in place of explicit rules, and where impersonal roles are particularized, rights sooner or later turn into privileges that can be suspended at will.

PART C

CONFERENCE PROCEEDINGS & PROSPECTS FOR FURTHER RESEARCH

CONFERENCE PROCEEDINGS

1. INTRODUCTION

The chapters in this book were the subject of a scientific conference in November 2009. At this conference several specialized scholars were invited to reflect on the content of these chapters. This chapter contains a summary of the discussants' contributions, presented in the same order as the chapters. The summaries were written by the editors.

2. DEFINING PUBLIC INTERESTS

2.1. FINDING THE EQUILIBRIUM

Prof. Oscar Couwenberg, University of Groningen
Chapter: The public interest in social security: an economic perspective (Nentjes & Woerdman)

If one considers social security from an economic point of view it is interesting to realize that public interference with social security legislation apparently cannot be explained by economic theory. After all, it is not in the self-interest of the individual to contribute to a system of social security. Individual rationality will in the end give rise to free rider behaviour and risk aversion, which will both hamper the existence of the collective social security benefits. And even if there are economic arguments to justify some aspects of social security, for example social assistance for the poor, it is still impossible to economically justify social security as a whole. There is simply too much of it. In other words, more arguments are needed to explain or justify the existence of social security.

The difficulty lies in finding the 'equilibrium' of social security regulation within society. This equilibrium is the optimum mix of both private schemes and public regulation that minimizes the total institutional or organizational costs in a society. The total costs consist of the cost of both public regulation and private schemes to secure income. If there is no government intervention at all, total costs of private schemes will be high. For example, in the absence of government regulation private insurance companies would select and fix contributions on the basis of whether or

not an individual is a 'good risk', leaving 'bad risks' uninsured. These bad risks (people at a risk of becoming unemployed) will either not find coverage for their risk or only on prohibitive conditions. In the case that only government regulation is allowed, all risks are covered by a public scheme, resulting in efficiency losses due to bureaucratic inflexibility and high agency costs.

An equilibrium must thus be found. A mix of both public and market mechanisms is almost inevitable. The arguments for more government intervention are, among others, that sometimes a market solution is impossible to attain. In the Netherlands, full privatization is quite often not feasible because of the size of the market. In the field of health care and social security in particular, these markets will easily transform into oligopolies or even monopolies, meaning that there are only a few suppliers that dominate the market, threatening the efficient allocation of resources. Social markets are especially vulnerable to oligopolies and monopolies. It is interesting that this is also the *result* of government interference. After all, administrative requirements to safeguard sustainable and safe service delivery for all citizens, demand high investments. A side effect of these requirements is that access for new suppliers will be blocked. It then becomes more attractive for competitors to work together. If this argument holds, the savings aimed for by introducing more market type mechanisms should not be exaggerated.

Another economic problem is the endemic problem of agency costs. Both public and private organizations face agency costs: the internal costs related to the organization caused by imperfect monitoring and systemic risks. The problem is that the interest of the organization will not always coincide with the interests of the agents working within these organizations and that the interest of the organization not always coincides with the interests of the insured. The bank crisis can serve as an illustration. The individual brokers ran huge risks as their own bonuses depended on it. Afterwards it appeared that the risks became unbearable causing problems for the organization as a whole. No one seemed to be able to judge the risk and to question whether or not the risk was worth taking. Organizations have to incur costs to correct these mechanisms. This illustration shows that agency costs are inevitable: both in private solutions with private companies and in the public sphere were the provision of services depends on governmental organizations. In both situations the agency costs involved have to be taken into account. These costs diminish the supposedly positive effects of market type mechanisms, but also the efficiency of governmental organizations.

2.2. THE SOCIAL CONTEXT OF THE WELFARE STATE

Dr. Rob Schwitters, University of Amsterdam
Chapters: The public interests of social security: a social science perspective (Plantinga)
The public interest and the welfare state: contemporary philosophy (Brinkman)

In the Netherlands the Workman's Compensation Act (Ongevallenwet) can be regarded as the first regulation of social security. Before this act the risk of loss of income caused by an accident due to the working circumstances was the subject of tort law. The employee had to sue his employer to receive compensation. The Ongevallenwet marked a change in perspective: the legislator realized that the private system had its failures. The fault based liability made it almost impossible for injured workers to win a procedure. Moreover it was recognized that fault liability could not be upheld in cases where the industry forced its personnel to expose itself to danger for the sake of productivity.

The Ongevallenwet can be seen as a first example of the tendency of a fault-based to a risk-based compensation of damage, which reflected a tendency to consider the injury caused by the production process increasingly as a matter of public concern. What is interesting is that already those days there were lawyers and politicians who were advocating –instead of a public regulation – a more generous standard of liability to be able to compensate the victims of modern industry. In the 20th century this tendency towards risk liability transformed many domains within tort law. Private law is seen as a tool to realize public interests for example as an instrument to compensate victims, as an instrument to redistribute means or as an instrument to enhance prevention. One could even say that modern tort law is in fact public law in disguise. This is exactly the topic of the research conducted in the first part of this volume: the idea that both private and public regulations are alternative options to realize public interests.

The social science approach has to distinguish the identification of public values from the manner they are realized. Public values may be realized by state intervention but also by the market or by civil law. A problem concerning the identification of public values is that these cannot be naively derived from what people say they consider public values. After all, what people appreciate is to a large extend determined by the institutional settings. The support for a value as solidarity may be the outcome of a prevalent system of social security, as for example the Swedish universalistic system is supposed to create solidarity, whereas the selective system of social assistance existing in the USA is undermining this value.

The implication of the last issue is that if we want to identify public values we cannot rely on the quick responses of individuals in an interview-setting. We have to address the respondents as participants in a democratic decision-making process, who reflect as well on their values as on their social institutions. An alternative approach might be to rely on more functional sociological explanations instead of the support indicated in surveys. Some structural transformations are not within the reach of deliberate human interventions, such as the level of industrialisation, globalisation of trade and expanding networks of interdependency. These are variables that will inevitably affect the public values within the society. For example, industrialization and rising mobilization erode informal networks of assistance and transform the compensation of victims into a public value. A more recent example is the urgency which the threat of terrorism creates to integrate immigrants and to reduce poverty on a global scale.

With this in mind one could add a second remark following Bozemans line of argumentation on public value failure. Public values are also affected by the previous policy choices regarding the organizational structure. One may for example assume that market solutions reduce the value of the willingness to pay for the (public) good. They may have perverting effects on incentive structures in that sense that values are reduced to what people are willing to pay for a good. That does not imply that a state provision is always contributing to more solidarity. A strong state provision destroys informal bonds of solidarity, making people more dependent on state bureaucracies. These bureaucracies have the tendency to grow and to provide social security inefficiently. An increase in anonymous state provisions may give rise to calculative behaviour and abuse by the beneficiaries of social security, making the public system even more expensive. Society's response in terms of public values might be that people value solidarity less. Two conclusions can be drawn from this. One conclusion is that one has to reduce state intervention given the diminishing priority of solidarity. The other conclusion is quite the opposite: more state intervention is required, aimed at combating the abuse of the public system, for example by tightening the control mechanisms (more unannounced home visits etcetera).

Therefore: one could question whether or not it is possible in a social science approach to distinct the issue of defining public values and the issue of safeguarding them. After all: the question how the public values are realized, will in the real world inevitably affect the support for these values.

Philosophical approach

Ultimately the definition of public values is influenced by the dominant political ideologies. Adding a philosophical dimension therefore contributes to the

understanding of the normative background of social security systems. After all, in the end social security has to provide justice. To assess whether or not a system of social security can provide justice one could use the method of reflexive equilibrium presented by Rawls: the application of general philosophical principles on concrete issues of social security, does not only provide a solid ideological basis of institutions and decisions, but facilitates also a reflection on the appropriateness of those principles. This method has two possible outcomes. One could use this method as a basis for arguing that current institutions should be improved, or, if the application of the abstract principle produces undesirable outcomes, that the abstract principle should be amended.

The philosophical approach used in this book states 'communitarianism' and 'liberalism' as two major philosophical ideologies justifying social security. Communitarianists appeal for a community oriented society in which every individual contributes his share. Liberals take the individual freedom as a starting point. From this perspective social security tends to resemble an instrument for ensuring individual interests.

It is important to note that both ideologies have several shades of grey. Although the core principles of both approaches are clear and unbridgeable there are forms of liberalism that have many characteristics in common with some forms of communitarianism. Within the field of liberalism one could distinguish the 'hard core' neo-conservative liberals who have a strong belief in the free-market and the liberals who advocate the most radical standard of redistribution. The latter will address the problem of free rider behaviour and will therefore advocate state institutions that enforce individual contributions. In this respect they do not differ substantially from the communitarianists. The only difference is the aim of the institutions: individual freedom versus solidarity.

In our globalizing societies in which individuals are connected to others in widening networks of interdependency, it becomes more opportune to justify state intervention in terms of a liberal position. Issues as international order, terrorism and environmental issues have created many new collective goods which demand coordinated intervention. Recent migration patterns have created more urgent problems of social integration. The shift in Dutch social security for a system of income compensation to a system at reintegration on the labour market has not necessarily solely communitaristic underpinnings; it may also be seen as a liberal response to safeguard a collective good.

2.3. THE ORIGIN OF THE WELFARE STATE

Dr. George Katrougalos, University of Trace
Chapter: The public interest and the welfare state: a legal approach (Vonk & Katrougalos)

In his article on the privatisation of poverty programs, Matthew Diller (2001, p. 1765) states that 'privatisation has proven attractive in the field of welfare because the problem of welfare has been rethought in a way that makes it more amenable to privatization'. Privatisation is therefore not only a phenomenon that affects the techniques of public management, but has inevitable consequences for the substantive part of welfare in general and social security in particular. Looking back the rise of social security would seem to be not only an institutional response to market failures. Social security is the answer to the social question that captured the 19th century: how could political rights be increased and social rights granted to the working class without opening the door to socialism?

If one interprets current norms and rights and tries to deduct public values with regard to social security, it is important to bear in mind the historical context in which these norms and rights came into being. The dilemmas lawyers faced in the past are quite similar to those we face now: the main questions were to what extent should the state interfere in private relationships and what would be the consequences with regard to state control for those using state aid? These dilemmas are still relevant. The only difference is the context in which these questions are raised. Nowadays state-interference is quite often the starting point, while in the very beginning the starting point was the private sphere. And nowadays human rights provide the beginning to the answer to what extent the state has a right to intervene when granting social security, while in the past these human rights were still to be developed.

To find the public values of social security one has to answer the question whether social security is a charity or a right. There are different answers to this question. In the English liberal-utilitarian approach the provision of social assistance under the Poor Law was incompatible with citizens' rights. Those in need of social assistance more or less abandoned their freedom. 'Whenever it happens that a man can claim nothing according to the rules of commerce and the principles of justice, he passes out of that department and comes within the jurisdiction of mercy.' Traces of this approach can be found especially with regard to the poor relief until the first decades of the 20th century. In many countries strict controls accompanied the social assistance provided to paupers, with in some cases paupers being virtually detained and re-educated. Based on this reasoning, the legal perspective is enriched. For an elaboration of this

contribution: see the chapter on the legal approach to public interests of social security.

3. INSTRUMENTS TO SAFEGUARD PUBLIC INTERESTS

3.1. THE NECESSITY OF A STRONG PUBLIC SPHERE

Prof. Cor van Montfort, Tilburg University
Chapters: Instrumentalisation of the public interest in social security:
an economic perspective (Nentjes & Woerdman)
Instrumentalisation of the public sphere:
a philosophical perspective (Westerman)

From an economic point of view the mechanisms to protect the public interest are focussed on maximizing the net benefits in society. With this in mind economists will search for situations in which transactions occur, giving both parties the opportunity to maximize their self-interest. As a consequence, this kind of interest has a rather restricted scope. In this respect the economic perspective on safeguarding public values betrays a certain opinion regarding the content of these values. Communitarian values are, for example, not easily compatible with these economic mechanisms. After all, social security is a phenomenon that is not easily explained by economic theory and relies therefore on other approaches, such as those proclaimed by communitarians such as Etzioni and Walzer.

The communitarianist approach argues that people are social beings, that they are what they are because they live in communities. Within these communities each individual has its own personal responsibility and autonomy. The society functions because of the shared understandings about core values. From this communitarianist approach there are certain roles the state has to fulfil. First of all: the state has to maintain a maximum of social integration as everybody should participate or be enabled to participate in society. Secondly: the state has to facilitate the proper moral debate as Etzioni calls it. The shared norms and values should be contested in, for example, social security. And finally, the state has to make it possible for every individual to be responsible for achieving his own goals.

The latter fits in with the economic perspective. Economic mechanisms such as transactions function because individuals agree on the transactions. They will do so because they benefit personally from these transactions. But it is important

to note that the communitarianist approach demands that these private transactions occur within a public sphere and a set shared values. The proper moral debate on shared values will not start in a market sphere.

A strong public sphere is necessary to safeguard public values. The problem with this public sphere is that it frequently malfunctions. The public sphere seems unable to organize the moral dialogue about the future of social security. In many Western European countries, not only the Netherlands, but also France and Germany, we see that the question as to what the common grounds of social security are and which measures are necessary to safeguard these values is full of taboos. The debate takes place within the capitalist elite, where the vested interests of employers are dominant and the voice of the 'common citizen' is simply underdeveloped. The interests of employees are only institutionalized in unions, although many employees do not belong to these unions and the social security measures – for instance care for the handicapped or social assistance – are not really in the interest of employees. Therefore the public debate lacks a serious exchange of arguments. The result is an arena of package deals clouding the true objectives.

If one recognizes the public sphere as a true safeguarding mechanism to protect public interests, it is therefore important not only to appoint a strong judge who could protect the public sphere, but also to organize a real moral dialogue about the shared values and true interests of social security. This calls for a critical press, a well organized civil society with an active intellectual elite and above all: a critical, responsive parliament.

3.2. MUDDLING THROUGH OR THE PURSUIT OF VALUES

Prof Michiel Heldeweg, Twente University
Chapter: Instrumentalisation public values in social security: a public administration perspective (De Ridder)

The scientific endeavour in this book is based on two questions: 'is social security considered to be a public interest, and how does the answer to this question reflect on the role of the state in social security?'. The public interest at hand is social security. The backdrop of community and market failure in delivering social security, as a societal interest, is a given fact. In the social science perspective the related public values that define the public social security interest are: compensation for unequal distribution, solidarity, efficiency and social and economic participation.

From the social science point of view the search for adequate safeguarding mechanisms seems to be a continuous quest, strongly akin to aiming at a moving

target. The problem that arises is that the instrument itself is not entirely neutral. It is quite often a matter of 'muddling through'. Introducing new mechanisms in response to old mechanisms' inadequacies. Generally, these 'old' mechanisms are nested in three spheres of social order: communities, markets and hierarchy. In turn, the 'new' mechanisms may be regarded as an attempt to re-balance these spheres. Hence the New Public Management (NPM) perspective seems relevant, since safeguarding social security has become a contingent puzzle, in which the proper mix of public and private law tools must be found, while accepting necessary trade-offs between the public values involved.

The NPM image of the regulatory state as a shift from rowing to steering must, in the context of public interests, be understood substantively. Steering isn't merely about setting the rules of the game; it is about the results which society has failed to bring about spontaneously. We are not concerned here, with the basic arrangements of a free market, where government merely seeks to ensure fair competition and basic consumer protection and does not take an interest in the delivery of any specific goods or services and thus limits itself to ensure system integrity through systemic supervision.

Government responsibility for social security, however, whether founded in a fundamental human right or otherwise, carries with it intrinsic public value. It may involve quasi-markets which provide an arena for reciprocal value exchanges but still government responsibility extends beyond ensuring system integrity and must ensure proper results, expressed in – amongst others, the principles of solidarity, compensation and participation.

So, while opening up input-legitimacy to reciprocal transactions, as 'exit' alongside 'voice', when public interests are involved, the regulatory state should meanwhile ensure output-legitimacy by insisting on a substantive government responsibility for the outcomes of the whole system of social security governance. This responsibility must be accompanied by strong public controls and a clear public expression also in terms of standards for service organisations and for service interactions with clients (and their empowerment). So yes, there is a clear connection between defining some societal interests as public, and the role that the state must play in the safeguarding of these interests.

Furthermore, one could propose that there is room for a 'regulatory bias', as a particular view on the 'definition-safeguard' connection. Where public interests are involved, the regulatory stance towards involving community or market mechanisms should be one of scepticism, simply as it is societal 'failure' that gave way to government involvement in the first place. That would be an argument in favour of 'No (markets), unless…', instead of 'Yes, if…'.

By now we can be fairly confident in assuming that research has presented us with abundant evidence-based knowledge containing some serious warning signs to governments endeavouring to outsource vital social security services, such as for instance the ineffectiveness and inefficiency of quasi-market arrangements for reintegration services.

This position is not in keeping with the general argument that the liberal democracy presupposes, that private and societal interests are best left to society and if possible should also be used to render public services. Perhaps then the choice between the 'No, unless…' and 'Yes, if…' approach should be linked to 'trust'. 'No, unless…' may then be exchanged for a 'Yes, if…' if government finds that it can trust private operators and their transactions as a matter of natural alignment between private and public incentives; in keeping with the free market mechanisms, where property and contract regimes ensure mutually appreciated legal certainty between private parties.

However, if regulation and supervision merely function as a straightjacket for private transactions, and trust merely hinges on supervision, this should be considered counter-indicative for privatisation – leading to high transaction costs and low performance, which seems especially painful when it leads to a failure in solidarity. No trust, no privatisation!

Of course these sketchy remarks are still a far cry from a true legal governance design methodology, linking governance to management and systematically addressing the dilemmas that De Ridder has skilfully analysed in terms of different types of feedbacks and applying the input-throughput-output model. With respect to this, this contribution is highly relevant in that it creates a multidisciplinary methodology, applicable to social security.

3.3. THE NEED FOR A CAREFUL ANALYSIS, IN THE LIGHT OF INTERNATIONAL STANDARDS, OF PRIVATE SOCIAL SECURITY ARRANGEMENTS

Prof. Frans Pennings, Utrecht University
Chapter: Instrumentalisation of public interests: a legal perspective (Tollenaar)

The study of the regulatory welfare state, in particular in view of privatization of social security, is an important one and very relevant to the continuing discussion on the need for the modernisation of social security. Legal instruments can have many shapes, ranging from the function of decentralized and deconcentrated bodies as a way to increase the legitimacy of the system as these may be closer to the citizen to the European and international legal order which create standards

by which national states have to abide. And within the national system one could distinguish the use of discretionary powers and the judicial review of the use of these powers and the mechanisms in private law, including the liability of the party if the weaker party incurs damage.

The legal literature seems more interested in the public mechanisms to safeguard public interests, despite the fact that in many cases private legal relationships seems to cover social risks as well. For example, social security arrangements can also follow from or be regulated by the contract between employer and employee. There appears to be a lack of knowledge in the way these private mechanisms work and the 'safeguarding value' of these mechanisms. Further research might focus especially on these aspects of social security. After all, private law safeguarding public values gives rise to new legal questions.

The example of the Dutch privatized sickness benefits can be seen as an illustration. The act itself is clear with regard to the public interests: there is a level of wage to be paid by the employer, if his employee falls ill. It is impossible for both parties to contract out of this duty. The act furthermore consists of norms with regard to the duration of payment, the limited grounds for refusal of payment and the obligations for the employer to help the ill person back into work. To this extent there is a strong public interference in the private relationship between employee and employer. But on the other hand: the public sphere has its boundaries. The law leaves room to both employee and employer with regard to the policy used to check whether the employee who claims to be ill is really ill. And both parties do also have some room to decide how they will undertake the reintegration process. Without a certain leeway both parties would not be able to fully aim for their own interests. But it is exactly this leeway that might endanger the public values. After all, the employee is the weaker party and his position is not fully protected. For the employer it is rather easy to exert pressure and force the employee to continue working under the threat of not paying the wages. There are of course procedures, for example that for obtaining a second opinion but these procedures come nowhere near to guaranteeing full protection.

There is always some form of dependency between two private parties, which public law has to solve. Sometimes this dependency leads to the misuse of positions or to a failure to comply with legal standards. Even though employers are not allowed to select employees on the basis of how likely they are to fall ill or to dismiss employees who are frequently ill, in practice it is not that difficult to hire only those persons who are believed to be healthy and to get rid of those who often call in sick. In both cases the law provides some protection to the weaker party, but these procedures do not really compensate the unequal position. The question then is do we need more safeguards and if so, which are recommended?

This question calls for an objective by which we can measure current failures. The Sickness Act is based on the activation and reintegration of persons who are sick but objectives are also available at an international level. For example the ILO provides standards with respect to public social security. Another question that has to be addressed is what role these standards should have in the domain of private social security. The ILO is currently somewhat critical of the 'privatization' of the Dutch Sickness Act. Are the arguments used by the ILO valid?

Once the failures have been defined the next step would be to search for adequate safeguards. One could think of many, from a complete ban on dismissing ill employees to a shift in the burden of proof. But new problems may arise from such solutions. Legal mechanisms such as these can easily be questioned from other perspectives, for example from the economic perspective. After all, a general ban on dismissing ill employees will create high costs for employers.

PROSPECTS FOR THE REGULATORY WELFARE STATE: RECOMMENDATIONS FOR FURTHER RESEARCH INTO SOCIAL MARKETS

Gijsbert Vonk and Albertjan Tollenaar

1. THE OUTCOME OF THE EXPERIMENT

In the introduction to this book, we referred to this study as an experiment. The goal of the experiment was to confront four different disciplines with the same two questions: is social security considered to be a public interest and how is the instrumentalisation of the public interest in social security perceived? Was the experiment successful? In our eyes it was, but only to a certain degree and not always for the reasons we anticipated. We had secretly hoped to be able to develop a common set of denominators according to which public interests can be identified. We learned a lot from the various contributions but, this aspiration proved to be too optimistic. Not only did the object and the approach of each of the informants lie too far apart to come to such understanding, but also the concept of the public interest itself remained too illusive.

The book has however, revealed another interesting element, namely that each of the disciplines appears to be heavily infected by the public private divide. As if this is some primeval truth out upon which all our knowledge is based. It is probably because of this instruments which mix public and private elements meet so much dogmatic opposition, also in this book. As we concluded in the first chapter, this opposition does not mean that there are alternatives for the regulatory state model. Neither do the dogmatic problems necessarily relate to the success of mixed governance structures. This leads us to an overwhelming question: does the problem lie with the regulatory welfare state itself or with the way in which we look at it? Whatever the answer to this question may be, this study has led us to believe that a too strict dogmatic distinction between public and private hinders us in gaining an understanding of how mixed governance structures operate.

For this reason we propose that a new theoretical framework should be developed which is capable of transcending the distinction between the public and private sphere. Such a framework is necessary if we want to study the empirical question of whether or not the regulatory welfare state is *successful*. The result is what we call research into the phenomenon of *social markets*.

2. ARTICULATING THE PUBLIC INTEREST

The first step in developing the theoretical framework of the social markets is to gain a better understanding of the normative point of departure. After all in order to monitor the success of the regulatory welfare state in social security, we must be able to measure the extent to which new forms of governance do contribute to realising social security as a public interest. In order to do so, we need, first of all, to gain a deeper understanding of the core principles of social security. These principles should be seen as objectives which should be adhered to whatever choices have been made as to the division of responsibilities between the state and private actors. A proposal for an articulation of such principles was included in the legal contribution of Part A of this study. The principles came under the headings of protection, inclusion, universality, reliability, solidarity, equality, and good governance. Two things need to be done to give further credence to such a proposal. First of all, research must be undertaken into the validity of these principles. A legal approach alone is not sufficient since, as has been pointed out, the core principles have extra-legal characteristics. We propose a mixed study based on economics, social sciences and the law. Secondly, it is important to break down the meaning of the various principles into smaller parts, so as to better understand and communicate exactly what we are talking about. This could ultimately produce a full catalogue of principles and standards.

3. GOVERNANCE INSTRUMENTS

This second layer of research would focus on the operation of the various governance instruments. The classical mechanism is legislation. But there are many alternative instruments to support the legislative framework: many forms of supervision, fiscal steering instruments, contract management, policy coordination, benchmarking, evaluation studies, comparing best practices, etc. We should gain better understanding of these 'alternative mechanisms' and in particular the ways in which they interact. What is needed to ensure that the market is regulated in such a way that all the objectives of social security are met? How do we obtain a balanced overview of the advantages and disadvantages,

and how can the success of alternative regulatory instruments be measured? Very often, these questions are not systematically addressed when governments decide to allow market forces to enter the social security system. Political preferences dominate the debate. A systematic overview of the consequences of mixed forms of governance helps to establish the right mix of instruments. Such an analysis should not only have an eye for the positive effects of alternative governance. The negative effects must also be taken into account. Are mixed governance structures really more efficient or will they only lead to more regulation? What is the democratic legitimacy of new forms of governance? Can these structures themselves be properly governed or are they too complicated and obtuse for both politicians and the general public to be understood?

4. CONCEPTUALISING SOCIAL MARKETS

Finally, more research needs to be done into the special characteristics of the markets that are created in the field of social security and social welfare at large: the *social markets*. The term 'social markets' is used here to denote a particular mode of governance whereby states organise social services (social insurance, assistance, care, pensions, housing, etc.) through third parties which compete for government contracts. These third parties can be private enterprises, non-profit organisations or even specialised government agencies. Profit is not the only relevant factor in this competition. What matters is that the actors manage to win government contracts on a structural basis. For this they have to build up co-operative networks, not only with the government but also amongst each other. Social markets are the quasi markets created in the social sector.[1]

What are the special characteristics of such markets and how can the functioning of these markets be protected and improved? Research in the area of social markets should challenge the public/private divide that still exists in many of our disciplines, including economics, law and political philosophy. The purpose is to transcend this divide and come up with proposals which take into account the characteristics of the social markets themselves. In fact, the proposals made by Pauline Westerman in Part B of this study for strengthening the regulatory welfare model are perfect examples of this approach.

'Social market research' must not take differences between public and private governance for granted just for dogmatic reasons. An example: within the public sector the attribution of new tasks to government agencies tends to be a rather

[1] Identified as such as early as in the beginning of the 1990s by Le Grand 1991. See also Le Grand 2000.

secretive affair, but when contracts are awarded to private parties, public procurement rules apply leading to full transparency. Is this difference justified? From the point of view of institutional competition it would be much better to allow public agencies to compete with private ones. However, competition rules currently still prohibit this. Perhaps we should therefore try to develop a new procurement regime that explicitly caters for the fact that private and public parties compete on an equal footing.

A common governance regime for social markets is also relevant from the point of view of EU law. EU law traditionally employs a strict dichotomy between the free market and the public sector. Social markets do not fit in to this dichotomy: without further regulation (of exemptions granted in EU case law) social hybrids will be broken up. Either they have to behave as commercial enterprises or they should be absorbed into the classical public domain. The European Commission is aware of this problem and has taken the initiative to draw up special norms for 'social services of general economic interest'.[2] The purpose of the initiative was to create more clarity about the character of these services and their relation to EU law. For political reasons this initiative has ground to a halt, but academic research can carry on. How should social markets be defined (with reference to the key principles of social security?) and how can they be protected by EU law?

2 26 April 2006, COM (2006) 117 def.

LIST OF REFERENCES

Alesina, A. & Angeletos, G.M. (2003), *Fairness and redistribution: U.S. versus Europe*, NBER Working Paper 9502, Cambridge: National Bureau of Economic Research 2003.

Alesina, A. & Glaeser, E.L. (2004), *Fighting Poverty in the US and Europe: A World of Differences*, Oxford: Oxford University Press 2004.

Alford, J. (2002), 'Defining the Client in the Public Sector: A Social-Exchange Perspective', *Public Administration Review* 2002, 62 (3), p. 337–346.

Anderson, E.S. (1998), 'What Is the Point of Equality?', *Ethics* 1998, 109 (1), p. 287–337.

Anderson, E.S (2009), 'Welfare, Work Requirements, and Dependant-Care', *Journal of Applied Philosophy* 2009 21 (3), p. 243–256.

Andreß, H. & Heien, T. (2001), 'Four Worlds of Welfare State Attitudes? A Comparison of Germany, Norway, and the United States', *European Sociological Review* 2001, 17 (4), p. 337–356.

Asscher-Vonk, I.P. (2005), 'Kwaliteit of kwantiteit: de voorstellen met betrekking tot de WW', *Sociaal Maandblad Arbeid* 2005, 60(9), p. 426–435.

Astri (2009), *Werkhervatting na herbeoordeling*, Leiden, 2009.

Auby, J-B. & Cluzel-Métayer, L. (2007), 'Administrative law in France', in: René J.G.H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States*, Antwerpen: Intersentia 2007.

Ayres, I. & Braithwaite, J. (1995), Responsive *regulation. Transcending the Deregulation Debate*, Oxford: Oxford University Press 1995.

Barendrecht, M. (1992), *Recht als model van rechtvaardigheid: Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming*, Kluwer, Deventer 1992.

Barnard, C. (2006), *EC Employment Law*, Oxford: Oxford University Press 2006.

Barr, N. (2004*), Economics of the welfare state*, Oxford New York: Oxford University Press 2004.

Barr, N. (ed.) (2005), *Labor Markets and Social Policy in Central and Eastern Europe: the Accession and Beyond,* Washington: World Bank 2005.

Becker, U. (2003), 'Organisation und Selbstverwaltung der Sozialversicherung', in: Bernd von Maydell & Franz Ruland (ed.), *Sozialrechtshandbuch*, Baden-Baden: Nomos 2003, p. 225–247.

Beitz, Ch.R. (1979), *Political Theory and International Relations*, Princeton: Princeton University Press 1979.

Bendor, J. (1995), 'A model of muddling through,' *American Political Science Review*, 1995 (89–4), p. 819–841.

Berghman, J. & Verhalla, I. (2002), 'Heading for the future, social security and social cohesion', in: J. Berghman et al. (eds), *Social security in transition*, The Hague: Kluwer Law International 2002, p. 11–20.

Berlin, I. (1958), 'Two Concepts of Liberty', *Liberty*, Oxford: Oxford University Press 1958.

Blekesaune, M. (2007), 'Economic Conditions and Public Attitudes to Welfare Policies', *European Sociological Review* 2007, 23 (3), p. 393–403.

Bonvin, J.M. & Moachon, E. (2007), 'The impact contractualism in social policies. The case of active labour market policies in Switzerland', *International Journal of Sociology and Social Policy* 2007, 27 (9/10), p. 401–412.

Borghouts-Van de Pas, I.W.C.M. & Pennings, F.J.L. (2008), *Arbeidsparticipatie van jonggehandicapten Een onderzoek naar Europese systemen en praktijken*, Tilburg: OSA 2008.

Borowski, M. (2007), *Grundrechte als Prinzipien*, Baden-Baden: Nomos 2007.

Bovens, M.A.P, Pellikaan, H. & Trappenburg, M. (eds.) (2000), *Nieuwe tegenstellingen in de Nederlandse politiek*, Amsterdam/Meppel: Boom 2000.

Bozeman, B. (2002), *All organizations are public: bridging public and private organizational theories,* San Francisco 1987.

Bozeman, B. (2002), 'Public-Value Failure: When Efficient Markets May Not Do', *Public Administration Review* 2002, 62 (2), p. 145–161.

Bozeman, B. (2007), *Public values and public interest. Counterbalancing economic individualism,* Washington: Georgetown University Press 2007.

Bozeman, B. (2008), 'Debate: Public value trade-offs and methodological trade-offs', *Public Money & Management* 2008, 28 (3), p. 135–136.

Bredgaard, T. & Larsen, F. (2008), 'Implementing public employment policy: what happens when non-public agencies take over?', *International Journal of Sociology and Social Policy* 2008, 27 (7/8), p. 287–300.

Breman, J. (2007), *The Poverty Regime in Village India: Half a Century of Work and Life at the Bottom of the Rural Economy in South Gujarat*, Oxford: Oxford University Press 2007.

Brenninkmeijer, A.F.M. (1996), 'Het primaat van de politiek bestaat niet meer. Over politieke rechtspraak, rechterlijk activisme en de legitimatie van rechterlijke oordeelsvorming', in: F.C.L.M. Jacobs & C.W.Maris (eds.), *Rechtsvinding en de Grondslagen van het Recht,* Assen: Van Gorcum 1996, p. 123–145

Brooks, C. & Manza, J. (2007), *Why Welfare States Persist. The Importance of Public Opinion in Democracies*, Chicago: University of Chicago Press 2007.

Brown, T. & Potoski, M. (2003), 'Managing contract performance: a transaction costs approach', *Journal of Policy Analysis and Management*, 2003 (22–2), p. 275–297.

Centraal Planbureau, *Challenging neighbours: rethinking German and Dutch economic institutions*, Berlin: Springer 1997.

CESCR (2007), *General Comment No 19: The right to social security (art. 9),* Geneva: CECR 2007.

Cichon, M. & Hagemeyer, K. (2007), 'Changing the development policy paradigm: Investing in a social security floor for all', *International Social Security Review* 2007, 60 (2/3), p. 169–196.

Clasen, J. & Van Oorschot, W. (2002), 'Changing Principles in European Social Security', *European Journal of Social Security* 2002, 4 (2), p. 89–115.

Collard, D. (1978), *Altruism and economy: a study on non-selfish economics*, London: Martin Robinson 1978.

Coomans, A.P.M. (ed.) (2006). *Justiciability of Economic and Social Rights – Experiences from Domestic Systems.* Antwerpen: Intersentia 2006.

Corrà, A.D.R., Plantinga, M. & De Ridder, J., *Contracting for complex services: Analyzing the contracting-out of employment reintegration services by Dutch municipalities*, paper presented at Public Management Research Association conference, Columbus, Ohio, October 2009.

Crepaz, M.M.L. (2008), *Trust beyond borders: immigration, the welfare state, and identity in modern societies*, Ann Arbor: University of Michigan Press 2008.

Culyer, A.J. (1980), *The political economy of social policy*, Oxford: Martin Robertson 1980. Reprinted in 1991 by Gregg Revivals, Gower House, Aldershot 1980.

Czúcz, O. & Pintér, M. (2002), 'Transformation of Old-Age Security in Hungary', in: Winfried Schmähl & Sabine Horstmann (eds.), *Transformation of Pension Systems in Central and Eastern Europe*, Cheltenham/Northampton: Edward Elgar 2002, p. 277–304.

D'Antonio, V. (2006), 'The Social Objectives of the European Union' in: R. Blanpain, M. Colucci & S. Sica (eds.), *The European Social Model*, Antwerpen: Intersentia 2006, p. 125–149.

Davis, K.C. (1980), *Discretionary justice: a preliminary inquiry*, Westport, CT: Greenwood Press 1980.

De Beer, P. & Koster, F. (2007), *Voor elkaar of uit elkaar? Individualisering, globalisering en solidariteit*, Amsterdam: Aksant 2007.

De Bruijn, H. & Dicke, W. (2006), 'Strategies for safeguarding public values in liberalized utility sectors', *Public Administration* 2006, 84 (3), p. 717–735.

De Graaf, K.J., Schuurmans, Y.E. & Tollenaar, A. (2007), 'Een nieuw denkmodel voor de feitenvaststelling in beroep?', *JB Plus* 2007 (2), p. 3–15.

De Kam, F. (2009), 'Zorguitgaven verdrukken overige collectieve uitgaven', *Economisch Statistische Berichten* 2009, 94 (4561), 29 mei 2009, p. 326–330.

De Swaan, A. (1989), *Zorg en de staat*, Amsterdam: Uitgeverij Bert Bakker 1989.

De Veer, A.J.E. et al. (2008), *Buurtzorg: nieuw en toch vertrouwd. Een onderzoek naar de ervaring van cliënten, mantelzorgers, medewerkers en huisartsen*, Nederlands Instituut voor Onderzoek naar de Gezondhieidszorg 2008.

De Veer, A.J.E. et al. (2009*), Ervaringen van Buurtzorgcliënten in landelijk perspectief. Addendum bij het rapport Buurtzorg: nieuw en toch vertrouwd*', Nederlands Instituut voor Onderzoek naar de Gezondhieidszorg 2009.

De Zwart, F. (2005), 'The dilemma of recognition: Administrative categories and cultural diversity, *Theory and Society* 2005, 34, p. 137–169.

De Zwart, F. (2000), 'Practical knowledge and institutional design in India's affirmative action policy', *Anthropology Today* 2000, 16 (2), p. 4–7.

Deakin, S. & Browne, J. (2003), 'Social Rights and Market Order: Adapting the Capability Approach', in: Hervey, T. & Kenner, J. , *Economic and Social Rights under the EU Charter of Fundamental Rights-A legal perspective*, Oxford-Portland Oregon: Hart Publishing, p. 27–43.

Deane, Ph. (1965), *The First Industrial Revolution*, Cambridge: Cambridge University Press 1965.

Den Hartog, H. & Tjan, H.S. (1974), *Investeringen, lonen, prijzen en arbeidsplaatsen*, Den Haag, CPB 1974.

Dicke, W. & De Bruijn, H. (2003), 'De borging van publieke belangen in de nutssectoren', *Bestuurswetenschappen* 2003, 57 (6), p. 474–493.

Diller, M. (2001), 'Form and Substance in the privatization of welfare programs', *UCLA Law Review* 2001, (49), p. 1740–1765.

Domberger, S. & Jensen, P. (1997), 'Contracting out by the public sector: theory, evidence, prospects', *Oxford Review of Economic Policy* 1997 (13–4), p. 67–78.

Donzelot, J. (1988), 'The promotion of the social rights', *Economy and Society* 1988, (17), p. 403–404.

Dorf, M.C. (2004), 'After bureaucracy', *The University of Chicago Law Review* 2004 (Summer), 71 (3), p. 1245–1273.

Downs, A. (1957), *An economic theory of democracy*, New York: Harper 1957.

Dupeyroux, M. (1966), *Ontwikkeling en tendenties van de stelsels van sociale zekerheid der lid-staten van de Europese Gemeenschappen en Groot-Brittannië*, Luxemburg: Europese Gemeenschap voor Kolen en Staal 1966.

Durand, R.F. (1992), 'Beyond markets, hierarchies, or clans', *Administration and Society* 1992 (24), p. 346–375.

Dworkin, R. (1981), 'What is Equality? Part 1: Equality of Welfare', *Philosophy & Public Affairs* 1981, (10), p.183–246

Dworkin, R. (1981), 'What is Equality, Part 2: Equality of resources', *Philosophy & Public Affairs* 1981, 10 (4), p. 283–345.

Dworkin, R. (2003), 'Equality, Luck and Hierarchy', *Philosophy & Public Affairs* 2003, 31 (2), p. 190–198.

Eisenstadt, S.N. (1959), 'Bureaucracy, bureaucratization, and debureaucratization', *Administrative Science Quarterly* 1959 (4), p. 302–320.

Eisenstadt, S.N. (2006), 'Civil Society and Public Spheres in a Comparative Perspective', *Polish Sociological Review* 2006 (2), p. 143–166.

Eisenhardt, K. (1989), 'Agency theory: An assessment and review', *Academy of Management Review* 1989, 14 (1), p. 57–74.

Ellis, D.P. (1971), 'The Hobbesian Problem of order', *American Socicological Review* 1971 (36), p. 692–703.

Esping-Andersen, G. (1990), *The Three Worlds of Welfare Capitalism*, Cambridge: Polity Press.

Etzioni, A. (1996), *The New Golden Rule*, New York: Basic Books 1966.

Fenger, H.J.M. & Klok, P.-J. (2008), 'Beleidsinstrumenten'Beleidsinstrumenten, in: Hoogerwerf, A. & Herweijer, M. (eds., *Overheidsbeleid*, Alphen aan den Rijn: Kluwer 2008

Ferge, Z. & Tausz, K. (2002), 'Social Security in Hungary: A Balance Sheet after Twelve Years', *Social policy and Administration* 2002, p. 176–199.

Finn, D. (2000) 'Welfare to work, the local dimension', *Journal of European Social Policy* 2000, Vol. 10 (1), p. 43–57.

Fleischacker, S. (2004), *A Short History of Distributive Justice*, Cambridge: Harvard University Press 2004.

Fluit, P.S. (2001), *Verzekeringen van solidariteit*, Deventer: Kluwer 2001.

Forsthoff, E. (1968), 'Verfassungsprobleme des Sozialstaats', in: Forsthoff, E., *Rechtsstaatlichkeit und Sozialstaatlichkeit: Aufsatze und Essays / herausgegeben von Ernst Forsthoff*, Darmstadt: Wissenschaftliche Buchgesellschaft 1968, p. 145–164.

Fried, B.H. (2004), 'Left-Libertariansim: A Review Essay', *Philosophy and Public Affairs* 2004, 32(1), p. 66–92.

Fultz, E. (2004), 'Pension reform in the EU accession countries: Challenges, achievements and pitfalls', *International Social Security review*, 2004, 57 (2), p. 25–42.

Galanter, M. (1994), 'Why the haves come out ahead', in: Cotterell, R. (ed.), *Law and Society*, Aldershot: Dartmouth 1994, p. 165–230.

Gelissen, J. (2000), 'Popular support for institutionalised solidarity: a comparison between European welfare states', *International Journal of Social Welfare* 2000, 9, p. 285–300.

Gelissen, J. (2008), 'European scope-of-government beliefs: the impact of individual, regional and national characteristics' in: Van Oorschot, W., Opielka, M. & Pfau-Effinger, B. (eds.), *Culture and Welfare State. Values and Social Policy in Comparative Perspective*, Cheltenham: Edward Elgar 2008, p. 247–267.

Gerards, J.H. (2005), *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff 2005.

Giddens, A. (1998), *The Third Way. The Renewal of Social Democracy,* Cambridge: Polity 1998.

Goodin, R.E., Heady, B., Muffels, R. & Dirven, H. (1999), *The Real Worlds of Welfare Capitalism*, Cambridge: Cambrige University Press.

Goudsblom, J. (1974), *Balans van de sociologie*, Utrecht, Het Spectrum 1974.

Grimes, R.L. (1975), 'Masking: Toward a Phenomenology of Exteriorization', *Journal of the American Academy of Religion* 1975, 43 (3), p. 508–516.

Groot, W. (2009), 'Van alles verzekerd', *Economisch Statistische Berichten* 2009, 94 (4568), p. 559.

Groot, W. & Maassen van den Brink, H. (2009), 'De effectiviteit van een individueel scholingsbudget', *Economisch Statistische Berichten* 2009, 94 (4565), p. 454–458.

Grubb, D. (2006), *Australia's quasi-market delivery of case management*, International Social Security Association International Experts Workshop of the ISSA Technical Commission on Unemployment Insurance and Employment Maintenance Case management to sustainable employment?, Brussels, Belgium, 10–11 April 2006.

Gupta Strategists (2010), *Trouw aan de belofte*, Gupta Strategists: 2010.

Habermas, J. (1962), *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, Neuwied und Berlin: Hermann Luchterhand Verlag GmbH, 1962.

Habermas, J. (1988), *Recht en moraal: twee voordrachten*, vert. door W. Van der Burg & W. Van Reijen, Kampen: Kok Agora 1988.

Hage, J. (2008), 'De betekenis van juridische statuswoorden', *Rechtsfilosofie & Rechtstheorie* 2008 (1), p. 13–28.

Hampsher-Monk, I. (1992), *A History of Modern Political Thought*, Oxford: Blackwell Publishing 1992.

Hanusch, H. (ed.) (1983), *Anatomy of government deficiencies*, Berlin: Springer 1983.

Harter, Ph. (2007), 'Administrative law in the United States', in: René J.G.H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States*, Antwerpen: Intersentia 2007, p. 351–397.

Hayek, F.A. (1944), *The road to serfdom*, Routledge, London & New York 1944.

Hayek, F.A. (1980), *Law, Legislation and Liberty: a new statement of the liberal principles of Justice and Political Economy*, London: Routledge 1980.

Hayek, F.A. (1982), *New Studies in Philosophy, Politics, Economics and the History of Ideas*, London: Routledge and Keagan Paul 1982.

Heinrich, C.J. & Choi, Y. (2007), 'Performance-based Contracting in Social Welfare Programs.' *The American Review of Public Administration* 2007, 37 (4), p. 409–435.

Heller, Th. (1996), 'Comments on the Economic Constitution of the European Community', in: Snyder, F. (ed.), *Constitutional Dimensions of European Economic Integration*, London: Kluwer Law International 1996, p. 149–165.

Hentchel, V. (1983), *Geschichte der deutschen Sozialpolitik*, Frankfurt: Suhrkamp 1983.

Heringa, A.W. & Kiiver, Ph. (2007), *Constitutions compared*, Antwerpen: Intersentia 2007.

Hochman, H.M. & Rodgers, J.D. (1969), 'Pareto optimal redistribution', *American Economic Review* 1969, 59, p. 542–557.

Hoekema, A.J. et al. (1998), *Integraal bestuur: de behoorlijkheid, effectiviteit en legitimiteit van onderhandelend bestuur,* Amsterdam: AUP 1998.

Holmstrom, B. (1979), 'Moral Hazard and Observability', *The Bell Journal of Economics* 1979 (Spring), p. 74–91.

Holzmann, R. & Hinz, R. (2005), *Old Age Income Support in the 21st Century: An International Perspective on Pension Systems and Reform*, Washington, DC: The World Bank 2005.

Hood, C. et al. (1999), *Regulation inside government: waste-watchers, quality police, and sleaze-busters*, Oxford: Oxford University Press 1999.

Hood, C. (2006), 'Gaming in Targetworld: The Targets Approach to Managing British Public Services', *Public Administration Review* 2006 (July/August), p. 515–521.

Hoogendijk, B. (1998), *Loondoorbetalingsverplichting gedurende het eerste ziektejaar*, Deventer: Gouda Quint 1998.

Howard, C. (2007), *The Welfare State Nobody Knows. Debunking myths about U.S. social policy*, Princeton: Princeton University Press 2007.

Huber, M., Maucher, M. & Sak, B. (2008), *Study on social and health services of general interest in the European Union: final synthesis report,* Vienna: European Centre for Social Welfare Policy and Research 2008.

Humphrey, C. & Laidlaw, J. (2004), *The Archetypal Actions of Ritual: A Theory of Ritual Illustrated By The Jain Rite of Worship*, Oxford: Clarendon Press 2004

ILO (2001), *Social security, a new consensus*, Geneva: International Labour Office 2001.

Jahn, E.J. & Ochel, W. (2007), 'Contracting-out employment services: temporary agency work in Germany', *Journal of European Social Policy* 2007, 17(2), p. 125–138.

Jans, J.H. (2006), 'De doorwerking in de nationale rechtsorde van het verbod van leeftijdsdiscriminatie als algemeen beginsel van gemeenschapsrecht', in: Herweijer, M., Vonk, G.J. & Zondag, W.A., *Sociale zekerheid voor het oog van de meester,* Deventer: Kluwer 2006, p. 115–129.

Janssens, F.J.G. (2005), *Toezicht in discussie, Over onderwijstoezicht en Educational Governance,* Twente 2005.

Jørgensen, T.B. & Bozeman, B. (2002), 'Public Values Lost? Comparing cases on contracting out from Denmark and the United States', *Public Management Review* 2002, 4 (1), p. 63–81.

Jørgensen, T.B. & Bozeman, B. (2007), *Public Values: An Inventory*, Administration & Society, 2007, 39, p. 354–381.

Jørgensen, T.B. (2007), *Public Values, Their nature, stability, and change, the case of Denmark*, Public Administration Quarterly 2007, 30 (4), p. 365–398.

Kannan, K.P. (2007), 'Social security in a globalizing world', *International Social Security Review* 2007 (2–3), p. 19–37.

Kant, I. (1785/1997), *Fundering voor de metafysica van de zeden* (translated by Thomas Mertens), Amsterdam:Boom 1997.

Kapuy, K., Pieters, D. & Zaglmayer, B. (2007), *Social security cases in Europe: The European Court of Human Rights*, Antwerpen: Intersentia 2007.

Katrougalos, G.S. (1996a) 'Human Rights in the Welfare State', *Jahrbuches des Őffentlichen Rechts der Gegenwart* 1996, p. 137–154.

Katrougalos, G.S. (1996b), 'The implementation of Social Rights is Europe', *The Columbia Journal of European Law* 1996, p. 277–312.

Katrougalos, G.S. (1998), *Constitution, Law and Rights in the Welfare State… and beyond*, Athens: A. Sakkoulas 1998.

Katrougalos, G.S. (2009), 'Constitutional limitations of Social Security Privatisation: A human rights approach', *European Journal of Social Security* 2010, 12 (1), p. 16–41.

Keijser, G.M.W.M. (2009), *Rapportage oorzaken financiële problemen bij Meavita*, Utrecht: College Sanering Zorginstellingen 2009.

Kelly, G., Mulgan, G. & Muers, S. (2002), *Creating Public Value: An Analytical Framework for Public Service Reform*, Discussion paper, London: Cabinet Office Strategy Unit 2002,.

Klosse, S. & Vonk, G.J. (2000), 'De betekenis van het recht voor de toekomst van de sociale zekerheid', in: Klosse, S. (ed.), *Sociale zekerheid: een ander gezichtspunt*, Brugge: die Keure 2000, p. 189–239.

Koch, I.E., (2005) 'Dichotomies, Trichotomies or Waves of Duties?', *Human Rights Law Review* 2005 (5), p. 81–93.

Koning, P. & Heinrich, C. (2009), *Creaming-skimming, parking and other intended and unintended effects of performance-based contracting in social welfare services*, CPB Discussieartikel 134, Den Haag, 2009.

Koning, P. & Heinrich, C. (2009), 'Risicoselectie door re-integratiebedrijven', *Economisch Statistische Berichten* 2009, 95 (4577), p. 38–41.

Korpi, W. (2001), 'Contentious institutions: an augmented rational-action analysis of the origins and path dependency of welfare state institutions in western countries', *Rationality and Society* 2001 (13), p. 235.

Korpi, W. & Palme, J. (1998), 'The paradox of redistribution and strategies of equality: welfare state institutions, inequality and poverty in the western countries', *American Sociological Review* 1998 (63), p. 661–678.

Kymlicka, W. (1990), *'Contemporary Political Philosophy: An Introduction,* Oxford: OUP 1990.

Lane, J.E. (2000), *New Public Management*, London: Routledge 2000.
Lapinski, J.S. et al. (1998), 'Welfare state regimes and subjective wel-being: A cross-national study', *International Journal of Public Opinion Research* 1998, 10 (1), p. 2–24.
Larsen, C.A. (2008), 'The Institutional Logic of Welfare Attitudes: How Welfare Regimes Influence Public Support', *Comparative Political Studies* 2008, 41 (2), p. 145–168.
Lavigne, P. (1946*), Le travail dans les Constitutions Françaises*, Paris 1946.
Le Grand, J. (1991), 'Quasi-markets and social policy', *Economic Journal*, 101 (408), p. 1256–1267.
Le Grand, J. (2000), 'Quasi-markets and social policy', in: Robert E Goodwin & Deborah Mitchell (eds.) *The foundations of the welfare state,* Cheltenham, UK: Edward Elgar 2000, p. 433–444.
Le Grand, J. (2003), *Motivations, agency and public policy, of knights and knaves, pawns and queens,* Oxford 2003.
Le Grand, J. & Bartlett, W. (1993), *Quasi-markets and social policy*, Basingstoke: Macmillan 1993.
Lehning, P.B. (2006), *Rawls,* Rotterdam: Uitgeverij Lemniscaat 2006.
Leibenstein, H. (1966), 'Allocative efficiency vs. 'X-efficiency', *American Economic Review* 1966, 56, p. 392–415.
Leibenstein, H. (1978), 'On the basic proposition of X-inefficiency theory', *American Economic Review* 1978, 68, p. 328–332.
Leisering, L. (2003), *From redistribution to regulation – regulating private provision for old age as a new challenge for the welfare state in ageing societies*, Working paper presented at ISSA conference 2003.
Liebenberg, S. (2007), 'The Judicial Enforcement of Social Security Rights in South Africa – Enhancing Accountability for the Basic needs of the Poor', in: Riedel, E.H. (ed.), *Social Security as a Human Right, Drafting a General Comment on Article 9 ICESCR*, Berlin: Springer 2007.
Lijesen, M., Kolkman, J. & Halbesma, S. (2007), *Publieke belangen en weginfrastructuur*, Den Haag: Kennisinstituut voor Mobiliteitsbeleid 2007.
Lindblom, Ch.E. (1959), 'The science of 'muddling through', *Public Administration Review* 1959 (19–1), p. 79–92.
Locke, J. (1690), *The Second Treatise of Civil Government.*
Luhmann, N. (1995), *Social Systems*. Stanford: Stanford University Press 1995.
MacIntyre, A. (1981), *After Virtue: A Study in Moral Theory*, Paris: University of Notre Dame Press 1981.
Mackor, A.R. (2006), *Te meten, of niet te meten: dat is de vraag*, Amsterdam: SWP 2006.
Marini, F. (1971), *Toward a new public administration; the Minnowbrook perspective*, Scranton 1971.
Marshall, T.H. (1975), *Citizenship and social class*, Cambridge: Cambridge University Press 1975.
Martin, D.L. (1996), 'The Limburg principles turn ten: an impact assessment', *Sim Special* 1996, 20, p. 191–205.
Maurer, H. (2009), *Allgemeines Verwaltungsrecht*, München: Beck 2009.
McKay, S. & Rowlingson, K. (1999), *Social Security in Britain*, London: MacMillan Press 1999.

Mertens, F. (2006), *Toezicht in een polycentrische samenleving*, TU Delft 2006.
Ministerie van Economische Zaken (2008), *Onderzoek marktwerkingsbeleid*, Den Haag: Ministerie van Economische Zaken 2008.
Ministerie van Sociale Zaken en Werkgelegenheid (2008), *Kerncijfers Wet Werk en Bijstand. Resultaten na de evaluatie,* Den Haag: Ministerie van Sociale Zaken en Werkgelegenheid 2008.
Minow, M. (1990), *Making All the Difference. Inclusion, Exclusion and American Law*, Ithaca/London: Cornell University Press 1990
Moore, M.H. (1995), *Creating Public Value. Strategic Management in Government*, Cambridge: Harvard University Press 1995.
Moran, M. (2002), 'Review Article: Understanding the Regulatory State', *British journal of political science* 2002 (32), p. 391–413.
Murphy, M.C. (ed.) (2003), *Alasdair MacIntyre*, Cambridge: Cambridge University Press 2003.
Nagel, Th. (1975), 'Libertarianism without foundations', *The Yale Law Journal* 1975, 85(1), p. 136–149.
Nentjes, A. (1989), *Economie van sociale vraagstukken*, Groningen: Wolters-Noordhoff 1989.
Newhouse, J.P. (1970), 'Towards a theory of nonprofit institutions: an economic model of a hospital', *American Economic Review* 1970, 50, p. 64–74.
Niskanen, W.A. (1971), *Bureaucracy and representative government*, Chicago/New-York: Aldine & Atherton.
Nozick, R. (1974), *Anarchy, state and utopia*, New York: Basic Books 1974.
Nussbaum, M. (2006), *Frontiers of Justice*, Cambridge: Belknap Press of Harvard University 2006.
O'Driscoll Jr, G.P. & Hoskins, L. (2006), 'The case for market-based regulation', *Cato Journal* 2006 (Fall) 26 (3).
O'Flynn, J. (2007), 'Research and Evaluation. From New Public Management to Public Value: Paradigmatic Change and Managerial Implications', *The Australian Journal of Public Administration* 2007, 66 (3), p. 353–366.
Offe, C. (1984), *Contradictions of the Welfare Society*, London: Hutchinson, Merrien.
Olivier, M.P., Smit, N. & Kalula, E.R. (2003), *Social Security: A Legal Analysis*, Durban: Butterworth 2003.
Osborne, D. & Gaebler, T. (1992), *Reinventing government: how the entrepreneurial spirit is transforming the public sector,* Addison-Wesley: Reading, Massachusetts 1992.
Ouchi, W.G. (1980), 'Markets, Bureaucracies and Clans', *Administrative Science Quarterly* 1980 (25), p. 129–141.
Partington, M. (2004), *Introduction to the English legal system*, Oxford: Oxford University Press 2004.
Pennings, F. (2001), *Introduction to European Social Security Law*, The Hague: Kluwer 2001.
Pennings, F. (2006*), Between soft and hard law. The impact of international social security standards on national social security*, Deventer: Kluwer Law International 2006.
Pierik, R. (2007), 'Het egalitarisme tussen gelijk burgerschap en gelijke omstandigheden.', *Algemeen Tijdschrift voor Wijsbegeerte* 2007, 99(1), p. 16–33.

Pieters, D. (1985), *Sociale grondrechten op prestaties in de grondwetten van de landen van de Europese Gemeenschap*, Antwerpen: Kluwer 1985.

Pieters, D. (2006), *Social Security: an introduction into the basic principles of social security*, Alphen aan den Rijn: Kluwer Law International 2006.

Plagemann, H. (2003), 'Ersatzplichter Dritter', in: Franz Ruland Bernd von Maydell, (ed.), *Sozialrechtshandbuch*, Baden-Baden: Nomos 2003, p. 437–466.

Plantinga, M. & Tollenaar, A. (2007), *Public Governance in the Dutch Welfare State: The Consequences of Privatisation for Securing Public Interests in the History of the Dutch Welfare State*, paper ECPR 2007, <http://ssrn.com/abstract=1103468>.

Pogge, Th. (2004), *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Cambridge: Polity Press 2004.

Pollitt, Ch. & Bouckaert, G. (2004), *Public management reform: a comparative analysis*, Oxford University Press 2004.

Popple, P.R. & Leighninger, L. (1993), *Social Work, social welfare and the American society*. Boston: Allyn & Bacon 1993.

Postma, J.K.T. (1995), 'Sociale zekerheid als onderdeel van de publieke financiën', in: Fritschy, W., Postma, J.K.T. & Roelevink, J., (eds.), *Doel en middel. Aspecten van financieel overheidsbeleid in de Nederlanden van de zestiende eeuw tot heden*, Amsterdam, NEHA 1995.

Preuss, U. (1986), 'The concept of rights in the Welfare State', in: G. Teubner (ed.), *Dilemmas of law in the Welfare State*, Berlin/New York: de Gruyter, W. 1986, p. 151–172.

Pröpper, I.M.A.M. & Herweijer, M. (2004), *Effecten van plannen en convenanten*, Deventer: Kluwer 1992

Prottas, J. (1979), *People processing. The street-level bureaucrat in public service bureaucracies,* Lexington: Lexington Books 1979.

Putnam, R.D. (1995), 'Bowling alone', *Journal of Democracy,* 1995 (6–1), p. 65–78.

Rawls, J. (1971), *A Theory of Justice*, Cambridge: Harvard University Press 1971.

Rawls, J. (2001), *Collected paper* (edited by Samuel Freeman), Cambridge: Harvard University Press 2001.

Rawls, J. (2002), *Justice as fairness: a restatement*, Cambridge: Harvard University Press 2002.

Recktenwald, H.C. (1980), 'Zur Theorie des Staatsversagens', *Public Finances* 1980, 35, p. 72–78.

Recktenwald, H.C. (1984), 'The public waste syndrome: a comprehensive theory of government failures', in: H. Hanush (ed.), *Public finance and the quest for efficiency*, Detroit: University Press 1984.

Riedel, E.H. (ed.) (2007), *Social Security as a Human Right, Drafting a General Comment on Article 9 ICESCR*, Berlin: Springer 2007.

Rijpkema, P. (2001), *Rechtersrecht*, Den Haag: Boom Juridische Uitgevers 2001.

Rimlinger, G. (1971), *Welfare Policy and Industrialization in Europe and America*, New York: Wiley 1971.

Roebroek, J.M. & Hertogh, M. (1998), *De beschavende invloed des tijds, twee eeuwen sociale politiek, verzorgingsstaat en sociale zekerheid in Nederland*, Den Haag: VUGA 1998.

Ross, A. (1957), 'Tû-tû', *Harvard Law Review* 1957, 70 (5), p. 812–815.

Ross, E.A. (1901), *Social control, a survey of the foundations of orde*r, New York: Macmillan 1901.

Rothbard, M.N. (1998), *The Ethics of Liberty*, New York and London: New York University Press 1998.

Salamon, L.M., Wojciech Sokolowski, S. & List, R. (2003), *Global Civil Society, An Overview*, Baltimore: Center for Civil Society Studies 2003.

Sandel, M.J. (1984), 'The Procedural Republic and the Unencumbered Self', *Political Theory* 1984, 12(1), p. 81–96

Schellhorn, W. & Schellhorn, H. (2002), *Kommentar zum Bundessozialhilfegesetz*, Kriftel: Luchterhand 2002.

Scheuerman, B. (1994), 'The Rule of Law and the Welfare State: Toward a New Synthesis', *Politics and Society* 1994, 22 (2), p. 195–213.

Schmitt, C. (1970), *Verfassungslehre*, Berlin: Duncker & Humblot 1970.

Schmitt, J. (2007), *Entgeltfortzahlung und Aufwendungsausgleichgesetz*, München: Beck, C.H., 2007.

Schreurs, P. (2003), 'De nieuwe kleren van de keizer? Waarden en het openbaar bestuur', Dijkstra, G.S.A., Van der Meer, F., & Rutgers, M.R. (eds.), *Het belang van de publieke zaak. Beschouwingen over bestuurskunde en openbaar bestuur*, Delft: Eburon 2003, p. 29–44.

Schröder, M. (2007), 'Administrative law in Germany', in: René J.G.H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States*, Antwerpen: Intersentia 2007.

Schuler, S. (1988), *Das Internationale Sozialrecht der Bundesrepublik Deutschland*, Baden-Baden: Nomos 1988.

Schwartz, H. (2000), *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago: University of Chicago Press 2000.

Schwitters, R. (1991), 'Riskante aansprakelijkheid', *Recht en kritiek* 1991, 17, p. 5–40.

Scruton, R. (1985), *A Short History of Modern Philosophy*, London & New York: Routledge 1985.

Searle, J. (1995), *The Construction of Social Reality*, New York: The Free Press 1995.

Sen, A. (1979), *Equality of What?*, Tanner Lectures 1979.

Sen, A. (2009), *'The Idea of Justice*, London: Allen Lane 2009

SEO (2007), *Kwantitatief effect WWB*, Amsterdam: SEO 2007.

Sepúlveda, M. (2003), *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*. Antwerpen: Intersentia 2003.

Sieyès (1939), *Des droits de l'homme et du citoyen, lu les 20 et 21 juillet 1789 au comité de la Constitution*, Hermann 1939.

Singer, P. (1972), 'Famine, Affluence and Morality', *Philosophy & Public Affairs* 1972, 1(3), p 229–243.

Smismans, S. (2004), *Law, Legitimacy, and European Governance: Functional Participation and Social Regulation*, Oxford: Oxford University Press 2004.

Smith, A. (1759), *The theory of moral sentiments*, London 1759.

Snyder, F. (ed.) (1996), *Constitutional Dimensions of European Economic Integration*, London: Kluwer Law International 1996.

Sol, E. & Westerveld, M. (2007), 'The individual job seeker in the sphere of contractualism', *International Journal of Sociology and Social Policy* 2007, 27 (7/8), p. 301–310.

Sol, E. et al. (2008), 'Does activation work in the Netherlands?', in: Eichhorst, W., Kaufmann, O. & Konle-Seidl, R. (eds.), *Bringing the Jobless Into Work?,* Berlin: Springer 2008.

Solomon, J.M. (2008), 'Law and governance in the 21st Century Regulatory State', *Texas Law Review* 2008 (68), p. 819–856.

Sparrow, M.K. (2002), *The regulatory craft, controlling risks, solving problems, and managing compliance*, Brookings 2002.

Stam, E., Stellinga, B. & De Vries, G. (2010), 'Marktwerking en publieke belangen', *Economisch Statistische Berichten* 2010 (95), p. 59–61.

Stamhuis, J.N. (2006), *Conflicting Interests in Corporate Regulation: An exploration of the limits of the interactionist approach to legislation in employee participation and corporate governance*, Groningen 2006.

Stanford Encyclopedia of Philosophy, <www.plato.stanford.edu>.

Stegeman, H. (2005), *De conjuntuurgevoeligheid van het ziekteverzuim*, CPB Document 99, Oktober 2005.

Stjernø, S. (2008), 'Social democratic values in the European welfare states', in: Van Oorschot, W., Opielka, M. & Pfau-Effinger, B. (eds.), *Culture and Welfare State. Values and Social Policy in Comparative Perspective*, Cheltenham: Edward Elgar 2008, p. 50–70.

Stoker, G. (2006), 'Public Value Management. A New Narrative for Networked Governance?', *American Review of Public Administration* 2006, 36 (1), p. 41–57.

Stout, H. (2007), *Weerbare waarden: Borging van publieke belangen in nutssectoren*, Den Haag: Boom 2007.

Svallfors, S. (1997), 'World of Welfare and Attitudes to Redistribution: A Comparison of Eight Western Nations', *European Sociological Review* 1997, 13 (3), p. 283–304.

Taylor-Gooby, P. & Martin, R. (2010), 'Fairness, Equality and Legitimacy: A Qualitative Comparative Study of Germany and the UK', *Social Policy and Administration* 2010 (44), p. 85–103.

Ter Rele, H. (2005), *Measuring lifetime redistribution in Dutch collective sector arrangements*, CPB Document no. 79, Den Haag: CPB 2005.

Teulings, C.N., Bovenberg, A.L. & Van Dalen, H.P. (2003), *De calculus van het publieke belang*, Den Haag: Kenniscentrum voor Ordeningsvraagstukken 2003.

Tideman N. & Vallentyne, P. (2001), 'Left-Libertarianism and Global Justice', in: Leiser, B.M. & Cambel, T. (eds), *Human Rights in Philosophy & Practice*, Ashgate Publishing 2001, p. 443–457.

Trappenburg, M.J. & van den Berg, P. (eds.) (1994), *Lokale rechtvaardigheid. De politieke theorie van Michael Walzer,* Zwolle: Tjeenk Willink 1994.

Tullock, G. (1971), 'The charity of the uncharitable', *Western Economic Journal* 1971, 9, p. 379–392.

Tullock, G. (1980), 'Efficient rent seeking', in: Buchanan, J.M., Tollison, R. & Tullock, G., *Towards a theory of the rent-seeking society*, College Station: Texas&M Press 1980.

Vagero, D. (1983), 'The evolution of Health Care Systems in England, France and Germany in the light of 1848', *Acta Sociologica* 1983, p. 83–95.

Van Berkel, R. & Van der Aa, P., 'The marketization of activation services: a modern panacea? Some lessons from the Dutch experience', *Journal of European Social Policy*, 2005, 15 (4), p. 329–343.

Van der Burg, W. & Pierik, R. (2003), *John Rawls: de filosoof van de liberaal democratische verzorgingsstaat*, www.rolandpierik.nl/Theory/Downloads/NJB.pdf.

Van den Hauten, M. (2003), *De werking van incentives. De reacties van werkgevers op de privatisering van de Ziektewet*, 's-Gravenhage: Reeds Business Information 2003.

Van der Veen, R. (2008), 'In voor- en tegenspoed? Over krimp en de verzorgingsstaat', *Beleid & Maatschappij&M* 2008, p. 289–298.

Van der Velde, F., Smeets, R.C.K.H. & Van Essen, G. (2007), *De Wet Maatschappelijke Ondersteuning en de arbeidsmarkt van de thuiszorg.* Eindrapport, Den Haag: Uitgave van Stichting FAOT 2007.

Van Gestel, N. (2003), 'Publieke belangen tussen overheid en markt. Over de reorganisatie van de sociale verzekeringen na 1993', in: Dijkstra, G.S.A., Van der Meer, F.M. & Rutgers, M.R. (eds.), *Het belang van de publieke zaak. Beschouwingen over bestuurskunde en openbaar bestuur*, Delft: Eburon, p. 55–70.

Van Loo, L.F. (1991), *Arm in Nederland 1815–1990*, Amsterdam/Meppel: Boom 1991.

Van Montfort, C.J. (2004), *Ruimte voor goed bestuur. Tussen prestatie, proces en principe*, Den Haag: WRR 2004.

Van Oorschot, W. (1998), 'Deservingness and conditionality of solidarity', *Sociale Wetenschappen* 1998, 41 (3), p. 54–78.

Van Oorschot, W. (2000), 'Why pay for welfare? A sociological analysis of reasons for welfare solidarity', *The Netherlands' Journal of Social Sciences* 2000, 36 (1), p. 15–36.

Van Oorschot, W. (2006a), 'Making the difference in social Europe: deservingness perceptions among citizens of European welfare states', *Journal of European Social Policy* 2006, 16 (1), p. 23–42.

Van Oorschot, W. (2006b), 'Solidariteit en het draagvlak voor sociale zekerheid: enkele kanttekeningen vanuit sociologisch perspectief', in: Herweijer, M., Vonk, G.J. & Zondag, W. (eds.), *Sociale zekerheid voor het oog van de meester*, Deventer: Kluwer 2006, p. 47–56.

Van Parijs, Ph. (1988), 'Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basis Income', *Philosophy & Public affairs* 1988, 20(2), p 101–131.

Van Vuren, A. (2006), *Wet Werk en Bijstand: een eerste kwantificering van effecten*, CPB Document 120, Den Haag 2006.

Vansteenkiste, S. (1995), *Sociale zekerheid, federalisme en de Europese Gemeenschap*, Leuven: Acco 1995.

Verdeyen, V. (2009), *Overheidssturing en socialezekerheidsinstellingen: mogelijkheden en instrumenten*, Leuven 2009.

Vloemans, A. (1980), *Politeia, Geschiedenis van de sociaal-politieke filosofie*, Den Haag: Kruseman 1980.

Vogel, S.K. (1996), *Freer markets, more rules: regulatory reform in advanced industrial countries*, Ithaca: Cornell University Press 1996.

Vonk, G.J. (1999), *Overijverige rechter of tekortschietende wetgever? De rol van rechter en wetgever bij het proces van doorwerking van internationale normen in het socialezekerheidsrecht*, Deventer: Kluwer 1999.

Vonk, G.J. (2002), 'Migration, Social Security and the Law, Some European Dilemmas', in: Berghman, J. et al. (eds.), *Social Security in Transition*, The Hague/London/New York: Kluwer Law International 2002, p. 77–92.

Vonk, G.J. (2007), *Managing the risks of 2nd pillar pension schemes; the situation in the former Yugoslavia and Albania*, Report for the Cards/SISP project of the Council of Europe, Strasbourg: Council of Europe 2007.

Vonk, G.J. (2009), 'Hunger as a policy instrument', in: Hospes, O. & van der Meulen, B. (eds.), *Fed up with the right to food, the Netherlands policies and practices regarding the human right to adequate food*, Wageningen: Wageningen Academic Publishers, p. 79–90.

Waldron, J. (1993), 'Social Citizenship and the defense of welfare provision', *Liberal Rights: Collected Papers 1981–1991*, Cambridge: Cambridge University Press 1993, p. 271–308.

Walsh, K. (1995), *Public services and market mechanisms: competition, contracting and the new public management,* London: Macmillan 1995.

Walzer, M. (1983), *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books 1983.

Wammes, H. (2009), 'Kleinschalige thuiszorg werkt', *NRC-Handelsblad*, 25 februari 2009.

Weber, M. (1980), *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*, Tübingen: C.B. Mohr 1980.

Westerman, P. (1998), *The Disintegration of Natural Law Theory: From Aquinas to Finnis*, Leiden: Brill 1998.

Westerman, P. (2007a), 'Governing by Goals: Governance as a Legal Style', *Legisprudence* 2007, p. 51–72.

Westerman, P. (2007b), 'The Emergence of New Types of Norms', in: Luc J. Wintgens (ed.), *Legislation in Context: Essays in Legisprudence*, Aldershot: Ashgate 2007, p. 117–133.

Westerman, P. (2010), 'Who is regulating the self?', forthcoming.

White, R. (1992), 'Toward an Understanding of the Origins of Material Representation in Europe', *Annual Review of Anthropology* 1992, p. 537–564.

Wikeley, N.J. & Ogus, A.I. (2002), *The law of Social Security*, London: Butterworths 2002.

Winston, C. (2006), *Government failure vs. market failure: microeconomics policy research and government performance,* AEI-Brookings Joint Center for Regulatory Studies 2006.

Wiser, J.L. (1983), *Political Philosophy, A History of the Search for Order*, London: Prentice-Hall, Inc 1983.

Woerdman, E. (2009), *Politiek en politicologie*, Groningen: Noordhoff 2009.

Wolff, K.H. (1964), *The Sociology of Georg Simmel*, Illinois: The Free Press 1964.

WRR (2000), *Het borgen van publiek belang*, Den Haag: Sdu Uitgevers 2000.

WRR (2002), *De toekomst van de nationale rechtsstaat*, Den Haag: Sdu Uitgevers, 2002.

Young, C.J. (2008), 'The minimum core of social and economic rights: a concept of search of content', *Yale Journal of International Law* 2008, (33), p. 113–179.

Zakaria, F. (2003), *The future of freedom*, New York/London: Norton & Co 2003.

Zeegers, N.E.H.M. & Bröring, H.E. (2008), *Professions under pressure. Lawyers and doctors between profit and public interests*, Den Haag: Boom Juridische uitgevers 2008.

ABOUT THE AUTHORS

Onno Brinkman
Onno Brinkman (LLM) studied law at the University of Amsterdam. He currently works as a Senior Policy Advisor for International Affairs at the Ministry of Social Affairs and Employment. He represents the Netherlands in international discussions within the ILO, UN and Council of Europe on social norms, especially in the field of social security. He also coordinates bilateral social security agreements. Onno Brinkman is preparing a PhD at the University of Groningen on the legal and philosophical aspects of basic social rights. His fields of interest are human rights, global justice and political philosophy.

Andries Nentjes
Andries Nentjes (Prof. Dr.) is honorary Professor of Economics at the Faculty of Law of the University of Groningen. He started his academic career in 1965 and in 1979 he became Professor of Economics of Social Policy at the Faculty of Social Sciences. In 1985 he was appointed to the professorship of Economics and Public Finance at the Faculty of Law as well as the Faculty of Economics. After having been emeritus professor for five years he restarted as honorary professor in 2009. Andries Nentjes has published in books, national scientific journals and peer reviewed international journals, mainly on the history of economics, environmental economics and law and economics. In the 1980s he was programme leader of a national research programme on the Austrian School in economics. In the 1990s he was leader of a programme on the emission trading; in that period he was a yearly visiting scholar at IIASA. Alongside his academic career Andries Nentjes was expert member of the Central Environmental Council and of the General Energy Council, and (unpaid) economic advisor on environmental policy to environmental organisations. He was also member of committees auditing the teaching of economics at Dutch Universities, was president of the Association for Post-Keynesian Economics and served on the board of the Royal Association for Economics. Andries Nentjes is officer in the Order of Orange-Nassau.

Mirjam Plantinga
Mirjam Plantinga (Dr.) graduated in Economics and Philosophy at the University of Groningen. She currently works as a post doctoral researcher at the Department of Administrative Law & Public Administration of the University of

Groningen. She is working on the project 'Public Governance in the Welfare State'. In 2006 she completed her PhD on employee motivation and employee performance in child care at the Center for Social Science Theory and Methodology (ICS). Plantinga's research interests lie in the interdisciplinary study of public sector reform and government regulation in the fields of social security, education and health care.

Jacobus de Ridder
Jacobus de Ridder (Prof. Dr.) holds a bachelor's degree in political science from the Free University of Amsterdam, a master's degree in public administration from the same university and the degree of doctor of law from the University of Groningen (1990). From 1982 until 1990 he was assistant professor, and since 1990 associate professor of Public Administration at the Faculty of Law of the University of Groningen. In 2003 he was appointed professor of public administration at the VIDE chair for administrative oversight. In 2008 he was appointed professor of public administration at the University of Groningen. De Ridder's research interests include administrative law and administrative practice, intergovernmental relations, comparative government, behaviour of law, politico-administrative relations, administrative oversight and police organization.

Albertjan Tollenaar
Albertjan Tollenaar (Dr.) is post doctoral researcher and assistant professor at the Department of Administrative Law & Public Administration. He participates in the project 'Public Governance in the Welfare State'. In 2008 he completed his PhD on municipality policy and policy rules. He studied Administrative Law and Public Administration (cum laude) at the University of Groningen. His publications focus on regulation, soft law and policy rules. He is Associate Editor Book Reviews of the 'Review of European Administrative Law' (REALaw). Tollenaar's research interests include the system of administrative law and its differences with respect to private law, the use of rules in social relations and codification of legal norms in the context of 'administrative justice'. In 2009 Tollenaar visited the Max Planck Institut für ausländisches und internationales Sozialrecht in Munich for comparative research.

Gijsbert Vonk
Gijsbert Vonk (Prof. Dr.) studied law in Amsterdam and London, before receiving a PhD for his research in the field of European social law at the University of Tilburg (1990). After having been head of the department for legal affairs at the Social Insurance Bank in Amstelveen from 1993 to 2006, he became professor of social security law in Groningen. He is also acting director of the Groningen Centre for Law and Governance. Furthermore, since 1990 he has been holding a part-time chair for Social Security Law at the Faculty of Law of

the Vrije Universiteit Amsterdam. Gijsbert Vonk's fields of interest are (international) social security law, public law and European law. Vonk is leader of two research programmes: cross border welfare state and public governance of the welfare state. Both are privately funded, long term research programmes which involve a number of doctoral and post doctoral research places.

Pauline Westerman
Pauline Westerman (Prof. Dr.), originally trained as a philosopher of science, wrote her PhD thesis on the history of Legal Philosophy (The Disintegration of Natural Law Theory: From Aquinas to Finnis, Brill, 1998). She is appointed Professor in Philosophy of Law at the Department of Legal Theory at the University of Groningen (0,8) and as a member of staff of the Academy for Legislation in The Hague (0,2). She is member of the Executive Committee of the International Association for Legal and Social Philosophy (IVR) and editor of *Legisprudence*, International Journal for the Study of Legislation. Her current interests include phenomena such as governance, interactive legislation, delegated legislation, various forms of soft law, informal legal arrangements and self-regulation.

Edwin Woerdman
Edwin Woerdman (Dr.) graduated with honours in political science at Radboud University Nijmegen, where he specialised in economic theory. At the University of Groningen he wrote a dissertation on environmental economics, published by Elsevier, and an introduction to political science, published by Noordhoff. After a joint appointment as a postdoctoral research fellow at the University of Twente in Enschede and at the University of Groningen, he became associate professor of law and economics at the University of Groningen in 2004. Since 2007, Woerdman is also co-director of the Groningen Centre of Energy Law. His current research largely builds upon institutional law and economics. He focuses mainly on the implementation of CO_2 emissions trading, the institutional design of energy markets (electricity, gas, hydrogen) and the path-dependent evolution of institutions. Alongside energy and pollution markets, his research interests lie in the interdisciplinary (economic, legal and political) study of governance and institutional change.